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In The

Supreme Court of the United States

October Term, 1994

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., MINNIE BOMMER, JEAN CARNEY, C.T. BOYD, BRENDA WOODS, SHIRLEY KEE, ANNA FAYE MOORE, REV. WILLIAM SMART, and WARREN DICKERSON,

Appellants,

v.

NED McWHERTER, GOVERNOR OF THE STATE OF TENNESSEE, JOHN WILDER, JAMES NAIFEH, WILL BURNS, LENITA MCGRAW, JANET BLACK, JUDY BISHOP, ELLA MAE ESCUE, SPENCE DUPREE, BOBBY WHITE, and LINDA BURNETT,

Appellees.

On Appeal From The United States District Court For The Western District Of Tennessee (Three Judge Court)

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Where a court reviewing a state's legislative redistricting plan finds that the *Gingles* prerequisites for a violation of Section 2 of the Voting Rights Act have been established and that the plan denies minority voters the opportunity to *elect* candidates of their choice, may the court deny a remedy to these voters on the ground that they are (in theory) sufficiently numerous in some districts to "influence" election outcomes?

2. Where minority voters satisfy the *Gingles* prerequisites, did the district court err in refusing to consider total population in determining whether a redistricting plan fairly reflects minority voting strength where the state used total population to determine district size, where the state concedes that minority voters were undercounted by the census compared to whites, and where white bloc voting against minority candidates is particularly pervasive and severe?

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three judge district court is not yet reported and is reproduced in the appendix hereto at App. 1.

JURISDICTION

The opinion of the district court was entered on February 22, 1995, App. 1, and the judgment was entered

on March 20, 1995. App. 39. A notice of appeal from the opinion was filed in the district court on March 22, 1995, App. 40, and a notice of appeal from the judgment was filed on April 12, 1995. App. 42. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331, 1343(a)(4), and 2284. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

STATUTORY PROVISIONS INVOLVED

Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, is set out at App. 44.

STATEMENT OF THE CASE

Appellants are the Rural West Tennessee African-American Affairs Council, Inc. ("RWTAAAC") and eight African-American residents and registered voters in Tennessee.[1] They filed suit against the Governor and other state officials alleging that the 1992 state senate redistricting plan diluted minority voting strength in violation of Section 2 and the Constitution. App. 4.

Following a trial, the three judge court found that the challenged plan violated Section 2. *RWTAAAC v. McWherter*, 836 F.Supp. 453, 466 (W.D.Tenn. 1993) [hereinafter *RWTAAAC I*]. To remedy the violation, the district court ordered the state to create one additional majority black senate district in west Tennessee, an area of the state with a substantial black population. App. 1.

The state appealed on the merits, and RWTAAAC cross-appealed on the ground that as a remedy they were

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[1] RWTAAAC is a non-profit Tennessee corporation established to promote voter registration, education, and political participation. It has no parent companies or subsidiaries. The Memphis Branch NAACP intervened in this action in the district court but is not a party to this appeal.

entitled to two, not one, additional majority black senate districts. This Court vacated and remanded both cases for further consideration in light of *Johnson v. De Grandy*, 114 S.Ct. 2647 (1994). *See McWherter v. RWTAAAC*, 114 S.Ct. 2775 (1994), and *RWTAAAC v. McWherter*, 114 S.Ct. 2776 (1994). On remand, the district court held that the senate plan did *not* violate Section 2. App. 25. In doing so, it erroneously held that this Court had "reversed" the decision in *RWTAAAC I*. App. 2.

Blacks are 16% of the total population and 14.4% of the voting age population ("VAP") of Tennessee. There are 33 state senate districts, three (9.1%) of which have a majority black VAP. Were blacks a majority in four (12.1%) of the districts they would still not have proportional electoral power. No black in this century has ever been elected to the state senate from a majority white district. *RWTAAAC I, supra*, 836 F.Supp. at 455, 463.

A. RWTAAAC I. In *RWTAAAC I* the court applied the analysis in *Thornburg v. Gingles*, 478 U.S. 30, 50-1 (1986), and held that: blacks were sufficiently large and geographically compact to constitute a majority in additional senate districts, 836 F.Supp. at 457; blacks were politically cohesive, *id.*; and, whites voted sufficiently as a bloc to enable them usually to defeat the minority's preferred candidate. *Id.* at 460.

Racial polarization was so extreme that "black candidates cannot expect to succeed in majority-white districts." 836 F.Supp. at 463. Blacks were discouraged from even running in majority-white districts because of the lack of "white support in the form of votes or fundraising," and because a "[l]ower economic status inhibits the ability of potential black candidates to raise funds in the black community." 836 F.Supp. at 459. The court found that "[h]istorical black political disenfranchisement also

limits potential black electoral success," and that black candidates "are not now in a position to enjoy the benefits of incumbency and political sponsorship which comes with being part of the political mainstream." *Id.*

Taking into account the "totality of the circumstances," the court concluded that the state's plan

> violates Section 2 by affording black voters in west Tennessee less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

836 F.Supp. at 466.

The district court expressly rejected the state's argument that it would be better under Section 2 for blacks to influence the outcome of elections in a greater number of districts as opposed to determining the outcome in a fewer number of districts. In reaching this conclusion the court relied upon "the language of the statute" which protects the right of minorities "to elect representatives of their choice." 836 F.Supp. at 466. It also relied upon prior decisions of this Court, *e.g.*, *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993), which sanctioned the use of majority black districts "to create visible black representation." 836 F.Supp. at 465-66. It noted that *Thornburg v. Gingles*, *supra*, "suggests strongly that the creation of majority black districts is the normal remedy for a § 2 violation." 836 F.Supp. at 466.

The district court relied upon the Senate report, S.Rep. No. 417, 97th Cong., 2d Sess. 16, 29 (1982), that accompanied the 1982 amendments of Section 2 to support its holding that the statute required the creation of majority black districts to remedy vote dilution. According to the court:

> The Senate report explaining the language of § 2 says 'the presence of minority elected officials is a recognized indicator of access' to the political

> process under the 'results' test. Senate Report at 193. It also says that 'the extent to which members of the minority group have been elected to public office in the jurisdiction' in question is a major factor in determining a violation of § 2. Senate report at 206-7.

836 F.Supp. at 466. The court concluded that:

> In light of this language [of the Senate report], it appears that § 2 opts in favor of visible black representation over other forms of political influence when racial block voting and a history of prior racial discrimination are present, as here. In such instances, § 2 as we interpret it opts for black control of some districts rather than spreading out black 'influence' in more districts likely to be represented by white elected officials.

836 F.Supp. at 466.

The lower court was "unimpressed" with the state's contention that there was no vote dilution because blacks were "a decisive swing vote" in certain white-white contests in which the white community was closely split. 836 F.Supp. at 459-60. The court dismissed this argument as based on the specious principle "that in majority-white districts, 'candidates favored by blacks can win, but only if the candidates are white.' " 836 F.Supp. at 460.

In implementing a remedy for the minority vote dilution, the district court held that the state was only required to create one additional majority black senate district. Creating two additional majority black districts "would provide slightly more representation [15.2%] than the state's black voting age population [14.4%] require." 836 F.Supp. at 467.

B. Remand. On remand, the district court accepted additional written and oral argument but did not reopen the record for additional evidence. In its second opinion

it affirmed all its factual findings in *RWTAAAC I* as being "correct." App. 5. It held that "all three *Gingles* preconditions are still satisfied," App. 6, and that "the plaintiffs demonstrated a history of official discrimination in voting; racial polarization in voting; [and] effects of discrimination in such areas as education, employment, and health." App. 6-7. Despite that, the court held that it erred in not considering so-called "influence districts which exist under the 1992 Plan." App. 8.

The court defined an influence district as one "in which a minority group composes 25% to 55% of the voting-age population." App. 18. Using this definition, the 1992 plan contained three influence districts, District 10 (32% black VAP), District 28 (31% black VAP), and District 30 (33% black VAP). App. 23 n.8. While blacks would not have an opportunity to elect candidates of their choice in these districts, they would have the opportunity to "influence elections." App. 13. The court also held that "[i]n some cases, an influence district may also exist when a minority group consists of less than 25% of the voting-age population of a district." App. 9.

In the court's view the existence of influence districts in the state's plan was dispositive on remand. Because of them there was no violation of Section 2, "even though the plaintiffs have demonstrated that the 1992 Plan does not result in proportionality, that the *Gingles* preconditions have been met, and that several factors listed in the Senate Report exist." App. 24.

The court repudiated its prior holding that "Congressional policy" based on "the language of § 2 and its legislative purpose strongly favor[s] the creation of majority black districts and visible black representation, instead of 'influence' districts." 836 F.Supp. at 466. Despite the fact that the legislative history (not to mention the language of Section 2 itself) had not changed, the

court was now of the view "that the legislative history does not speak at all to what role influence districts should play in voting rights cases." App. 17. The district court held influence districts should be included in the Section 2 calculus because this Court "has instructed that the inquiry should be quite broad and take into account as many relevant factors as possible in evaluating the 'totality of the circumstances.' " App. 12.

While it was formerly "unimpressed" with the "decisive swing vote" argument, 836 F.Supp. at 459-60, the district court now embraced it in its entirety. App. 13. According to the court:

> Black voters in the influence districts have not necessarily been deprived of the opportunity to vote for candidates of their choice, even if they do not always have the opportunity to elect what some consider a perfect candidate, *i.e.*, a candidate of their own race.

App. 24. The lower court found support for its influence theory in *De Grandy*, holding that "[w]hen minority voters can influence elections, they have the opportunity to 'pull, haul and trade to find common political ground.' " App. 13, *citing De Grandy*, 114 S.Ct. at 2661.

Although the ultimate inquiry under Section 2 is whether the *majority* votes as a bloc usually to defeat the candidates preferred by the minority, *Thornburg v. Gingles*, *supra*, 478 U.S. at 51, the district court, in touting the virtues of influence districts, relied heavily upon the testimony of white legislators that they sought and received black votes. App. 20-1. The court was also of the view that white elected officials were often responsive to the needs of blacks and that "adding an additional majority-minority district in western Tennessee would actually reduce the influence of black voters in the Tennessee Senate." App. 22. It found "most probative" for this proposition the testimony of a white senator (Stephen Cohen)

from west Tennessee – testimony it had previously found unpersuasive, 836 F.Supp. at 465 – concerning passage of a bill to make the birthday of Martin Luther King, Jr. a state holiday. App. 22. According to Senator Cohen, the bill passed the state senate by only one vote (17 to 16), with Senator Cohen and another white senator from west Tennessee voting with the majority. Senator Cohen concluded, and the district court found, that the creation of an additional black senate district would cause the election of "at least one more conservative white senator" who "would have been inclined to vote against the Martin Luther King holiday" ensuring that the measure would not have passed. App. 22. Senator Cohen, and the court, were mistaken. Only eight senators voted against the Martin Luther King, Jr. bill, with 18 "Ayes" and six "Present, not voting." Tennessee Senate Journal, May 24, 1984, p. 2831.

The district court also held that in light of *De Grandy* it had overemphasized the lack of proportionality in the challenged plan. App. 30. To create proportionality "would mean that the percentage of blacks in the voting-age population would require 14.4% of the districts to be majority-minority districts." App. 26. Nonetheless, the court would still have reinstated its holding in *RWTAAAC I* but for the existence of the influence districts.

> Were there no influence districts included in the 1992 Plan, the lack of proportionality in this case combined with other factors would be sufficient to find that § 2 had been violated. But once we include influence districts in the calculus, the lack of proportionality is not significant enough to compel a holding that the Plan violates the Voting Rights Act.

App. 30-1.

The court further held that whether statewide or regional racial percentages were used, the inclusion of

"influence districts in our analysis . . . yield[s] findings that § 2 has not been violated." App. 34.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The district court found, both before and after remand, that blacks in Tennessee were sufficiently large and geographically compact to constitute a majority in additional senate districts, they were politically cohesive, and whites voted sufficiently as a bloc to enable them usually to defeat the minority's preferred candidates. Racial polarization was extreme and black candidates could not expect to win in majority-white districts. The court also found the existence of factors identified in the legislative history of Section 2 as being probative of vote dilution, such as a history of official discrimination in voting, the continuing effects of that discrimination in education, employment, and health, few black elected officials, that blacks were discouraged from even running in majority white districts, and a lack of proportionality.

The court acknowledged that as a factual matter blacks did not have the equal opportunity to elect candidates of their choice, and that "[w]ere there no influence districts included in the 1992 Plan, the lack of proportionality in this case combined with other factors would be sufficient to find that § 2 had been violated." App. 30. For the court, the determinative factor was the existence of three so-called influence districts in which blacks were 31% to 33% of the VAP. Blacks had no opportunity to elect candidates of their choice in these districts, and could only influence the election of second-choice (and necessarily white) candidates. Nonetheless, the court concluded that there was no Section 2 violation. In reaching this conclusion, the district court failed to follow the decisions of this Court. The decision below is also in conflict with the decisions of other lower federal courts,

and ignored the clear language of Section 2 and the intent of Congress in enacting the statute.

I. Section 2 Protects the Equal Opportunity to Elect

A. The Language of the Statute. Section 2, as amended in 1982, by its express terms protects the equal right of minorities "to *elect* representatives of their choice," 42 U.S.C. § 1973(b) (emphasis added), and not merely the opportunity to influence elections. The lower court, by its own admission, did not apply an equal-opportunity-to-elect standard. Had it done so it would have reinstated its holding in *RWTAAAC I*. App. 30 ("were we still unable to consider the existence of influence districts, we would reinstate our holding in *Rural West I*").

The district court impermissibly amended Section 2 and substantially reduced its scope. It held that the statute only protects the right of minorities to elect "some" candidates of their choice and to influence the election of some others who are admittedly not their candidates of choice. The decision is directly in conflict with the plain language of Section 2 which protects the equal right of minorities to elect representatives of their choice, and for that reason should be reversed. *Rubin v. United States*, 449 U.S. 424, 430 (1981) ("[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete"); *Connecticut National Bank v. Germain*, 112 S.Ct. 1146, 1149 (1992) ("courts must presume that a legislature says in a statute what it means and means in a statute what it says there").[2]

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[2] This Court has not decided whether "influence-dilution claims" can be brought under Section 2. Voinovich v. Quilter,

B. The Legislative History. Although one need not look beyond the unambiguous language of the statute, it is clear from the legislative history that Congress intended Section 2 to protect the equal opportunity to elect candidates of choice and not merely the opportunity to influence the outcome of elections. During the congressional hearings, opponents argued that the amendment of Section 2 would actually limit the political opportunities of minorities by allowing them "to become isolated" in single member districts, and would "prevent minority members from exercising influence on the political system beyond the bounds of their quota." *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 511 (statement of Dr. Edward J. Erler) and 1115 (statement of Robert M. Brinson) (1982) [hereinafter *Voting Rights Act Hearings*]. Members of the Senate subcommittee similarly argued that adoption of a results standard for Section 2 would lead to the creation of majority-minority districts, or "political ghettos for minorities," and that while "[m]inority *representation* in the most primitive sense may be enhanced by the proposed amendment . . . minority *influence* would suffer enormously." S.Rep. No. 417, *supra*, at 103 (additional views of Sen. Orrin G. Hatch of Utah).

Congress weighed these arguments, but determined that minorities should be guaranteed the equal right to elect representatives of their choice, and that districting

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supra, 113 S. Ct. at 1155; Johnson v. De Grandy, *supra*, 114 S.Ct. at 2656. Appellants believe it would be appropriate for a district court in judging the overall fairness of a redistricting plan to consider the existence of districts in which minority voters, with the help of white crossover votes, could elect candidates of their choice, at least where majority-minority districts could not be drawn. But that is far different from concluding, as did the district court, that districts in which blacks are the minority are simply a substitute for effective minority voting districts.

systems were an appropriate way of securing that right. According to the Senate report, the testimony and other evidence presented to the subcommittee belied the predictions and speculations that the amendment of Section 2 would limit the political opportunities of minorities. S.Rep. No. 417, *supra*, at 31-2. The subcommittee found there was "an extensive, reliable and reassuring track record of court decisions using the very standard which the Committee bill would codify." *Id.* at 32.

The principal decision on which the committee and Congress relied was *White v. Regester*, 412 U.S. 755 (1973), the first decision of this Court invalidating multimember legislative districts on the grounds that they diluted minority voting strength and requiring the adoption of single member districts to bring the minority community "into [the] full stream of political life of the county and State by encouraging their further registration, voting, and other political activities." *Id.* at 769, 773. In 1982 Congress adopted the legal standard for proving vote dilution established in *White v. Regester*, *supra*, as the "results test" of amended Section 2. *Thornburg v. Gingles*, *supra*, 478 U.S. at 35. Indeed, the language of Section 2(b) that a violation of the statute is shown by evidence "that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," was taken verbatim from *White v. Regester*, *supra*, 412 U.S. at 766.[3]

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[3] Aside from the judgment of members of Congress, minorities who testified before the committee also strongly supported the amendment of Section 2 and the adoption of the White v.

The Senate report, moreover, provides that in implementing remedies for Section 2 violations, a "court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." S. Rep. No. 417, *supra*, at 31. One of the voting cases cited in the report as representing the opportunity to elect standard was *Kirksey v. Board of Supervisors*, 554 F.2d 139 (5th Cir. 1977), in which the court rejected a proposed redistricting plan for the board of supervisors of Hinds County, Mississippi because the two minority districts contained only "skin-of-the-teeth" black majorities, and therefore failed to provide blacks a "realistic opportunity" to elect representatives of their choice (rather than merely the opportunity to "influence" election outcomes in the districts). *Id.* at 150-51. The court also rejected the claim that an ameliorative plan "would be a racial gerrymander." *Id.* at 151. Thus, throughout the legislative history, Congress stressed that the standard under Section 2 is one of equal opportunity to elect. *See* J. Morgan Kousser, "Beyond Gingles: Influence Districts and the Pragmatic Tradition in Voting Rights Law," 27 *U. San. Fran. L. Rev.* 551 (1993) ("there is no doubt that Congress has decided that the standard should be that minority voters should have a fair opportunity to *elect* candidates of their choice – that is, to determine the choice regardless of the desires of

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Register standard. *See, e.g., Voting Rights Act Hearings* at 448-49 (statement of Henry L. Marsh III, mayor of Richmond, Virginia), 564-65 (statement of Joaquin G. Avila, associate counsel of MALDEF), 1254-55 (statement of Julius L. Chambers, president of NAACP Legal Defense Fund, Inc.).

majorities of majority group voters – and that district systems protect that right better than at-large systems").[4]

Where Congress has assessed and weighed conflicting factors in an area such as voting rights in which it has a specially informed legislative competence, a court is not permitted "to review the congressional resolution of these factors." *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966). Instead, a court is obligated to defer to the judgment of Congress, a coordinate branch of government, provided the court is "able to perceive a basis upon which the Congress might resolve the conflict as it did." *Id.* There clearly is a basis upon which Congress could determine that majority-minority districts were an appropriate way to advance the goal of equal political participation. The district court erred in rejecting the judgment of Congress and imposing its own view that influence districts were a substitute for majority-minority districts, and that additional majority-minority districts would reduce the political power of black voters.

C. The Decisions of this Court. In light of the language of the statute and the legislative history, this Court has affirmed that Section 2 guarantees the equal right of minorities to elect candidates of their choice. In *Thornburg v. Gingles, supra*, 478 U.S. at 88, Justice O'Connor noted in her concurring opinion that the Court had resolved that:

> minority voting strength is to be assessed solely in terms of the minority group's ability to elect candidates it prefers. . . . Under this approach,

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[4] The full and complete remedy standard of Section 2 is different, of course, from the kind of maximization rejected by Johnson v. De Grandy, *supra*, 114 S.Ct. at 2660 and n.13, which would require providing a minority group with effective political power far in excess of its numerical strength in the jurisdiction.

> the essence of a vote dilution claim is that the State has created single-member or multimember districts that unacceptably impair the minority group's ability to elect the candidates its members prefer.

(emphasis omitted). *Accord, Voinovich v. Quilter, supra,* 113 S. Ct. at 1155 (Section 2 guarantees the right "of a protected class to elect its candidate of choice on an equal basis with other voters"); *Holder v. Hall,* 114 S.Ct. 2581, 2595 (1994) ("the Court has adopted the view that members of any numerically significant minority are denied a fully effective use of the franchise unless they are able to control seats in an elected body") (Thomas, J., concurring in the judgment).

Johnson v. De Grandy, supra, further indicates that *RWTAAAC I* was correctly decided. This Court reaffirmed in *De Grandy* that "society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity." 114 S.Ct. at 2661. The Court held that equal political opportunity under Section 2 should be determined in light of the totality of facts, including the existence of proportionality, a term which "links the number of majority-minority voting districts to minority members' share of the relevant population." 114 S.Ct. at 2658. By linking proportionality to the existence of influence districts, the lower court failed to follow *Johnson v. De Grandy.*

Far from endorsing substituting influence districts for minority opportunity districts, *De Grandy* holds only that where racial bloc voting is not present and minorities have "no need to be a majority within a single district in order to elect candidates of their choice," there is no duty to create majority-minority districts. 114 S.Ct. at 2661. By the district court's own admission, majority-minority districts *are* needed in Tennessee in order for blacks to elect candidates of their choice.

Moreover, the Court acknowledged in *Johnson v. De Grandy, supra,* 114 S.Ct. at 2655, that minority voting strength can be diluted "by fragmenting the minority voters among several districts where a bloc-voting majority can routinely out-vote them." Section 2 prohibits this "sort of line-drawing where its result . . . impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters." *Id.* In the context of racial bloc voting and other social and historical conditions found by the district court to exist in Tennessee, creating so-called minority influence districts is nothing more than a euphemism for "fragmenting the minority voters." *Accord, Connor v. Finch,* 431 U.S. 407, 423 (1977) (criticizing redistricting in Mississippi which fragmented areas "where much of the Negro population is concentrated"). *See* Frank Parker, *Black Votes Count: Political Empowerment in Mississippi after 1965* 51 (1990) (identifying "the fragmentation of black population concentrations to prevent blacks from having an effective voting majority in any district" as one of the classic techniques of racial gerrymandering). It is an irony for a court to approve a plan which intentionally fragments the black population on the pretext of providing minorities effective political participation under the Voting Rights Act.

D. The Decisions of other Lower Federal Courts. The decision of the court below that effective majority-minority voting districts are not required under Section 2 and that they might diminish minority influence also conflicts with decisions of other lower federal courts. In *Gingles v. Edmisten,* 590 F.Supp. 345 (E.D.N.C. 1984), *aff'd in part and rev'd in part sub nom. Thornburg v. Gingles, supra,* the district court took special note of the action taken by Congress in amending Section 2 and invalidated North Carolina's legislative reapportionment. The district court stated:

> Congress necessarily took into account and rejected as unfounded, or assumed as outweighed, several risks to fundamental political values that opponents of the amendment urged in committee deliberations and floor debate. Among these were the risk that . . . creating 'safe' black-majority single member districts would perpetuate racial ghettoes and racial polarization in voting behavior; the risk that reliance upon the judicial remedy would supplant the normal, more healthy processes of acquiring political power by registration, voting and coalition building . . .

590 F.Supp. at 356. Similarly, in *Dillard v. Baldwin County Commission*, 694 F.Supp. 836, 844 (M.D.Ala. 1988), the court rejected arguments that majority black districts prevent "coalition building" and do "not help those black citizens who live outside majority black single-member districts." As the court found, "[t]hese arguments and others were rejected by Congress when it amended § 2 in 1982." *Id.*

Numerous lower courts have held that where the conditions for its application are met as here, Section 2 requires the creation of majority-minority districts. In *McGhee v. Granville County, N.C.*, 860 F.2d 110, 118 (4th Cir. 1988), for example, the court held that where vote dilution is established "the appropriate remedy is to restructure the districting system to eradicate, to the maximum extent possible *by that means*, the dilution proximately caused by that system." The allowable remedy should be constrained only "by the size, compactness, and cohesion elements of the dilution concept."

The decision of the district court that Section 2 does not guarantee the equal opportunity to elect candidates

of choice plainly conflicts with the decisions of other lower federal courts.[5]

II. The District Court's Definition of Influence Is Erroneous

While this Court has not expressly held that claims of influence dilution can be brought under Section 2, it has defined influence districts as "districts in which black voters would not constitute a majority but in which they could, with the help of a predictable number of crossover votes from white voters, elect their candidates of choice." *Voinovich v. Quilter, supra,* 113 S.Ct. at 1155. Similarly, in *Thornburg v. Gingles, supra,* 478 U.S. at 89 n.1, Justice O'Connor asserted in her concurrence that a minority too small to constitute a majority in a single-member district would have an interest protected by Section 2 – whether

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[5] During oral argument on remand, some members of the district court expressed concern over the partisan impact of remedial redistricting. *E.g.,* Transcript of Oral Argument, November 1, 1994, p. 46 ("[C]reating districts which would elect more visible black representatives . . . will provide for the enlargement of the Republican representation in the South. . . . Now, maybe the federal courts have got to stop and say what is going on here, is this really the role of the courts?") (comments of Judge Merritt). There was no evidence at trial that the creation of additional majority black districts would "consistently degrade" the influence of Democrats or any other party on the political process in Tennessee. Davis v. Bandemer, 478 U.S. 109, 132 (1986). In addition, nothing in this Court's equal protection jurisprudence suggests that the federal courts should refuse to implement remedies for vote dilution because the remedies might have an impact on party alignment. *See* Davis v. Bandemer, *supra,* 478 U.S. at 151 (noting "the greater warrant the Equal Protection Clause gives the federal courts to intervene for protection against racial discrimination" in voting) (O'Connor, J., concurring in the judgment).

it be called the ability to elect or the ability to influence elections – if it "can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer."

Here, the district court adopted a definition of influence under Section 2 that is contrary to the decisions of this Court and is practically meaningless because it is divorced from any consideration of white crossover voting. In an area such as west Tennessee where racial bloc voting is "extreme" and "overwhelming," App. 28, *RWTAAAC I*, 836 F.Supp. at 457, the idea that a minority nonetheless has significant influence or clout in elections is illogical and inconsistent with the very definition of minority vote dilution. *See Thornburg v. Gingles, supra*, 478 U.S. at 48 n.14 (racial bloc voting leaves "the minority effectively unrepresented").

A. The Court Confused Responsiveness with the Equal Opportunity to Elect. The district court's analysis is flawed in large measure because it conflated the responsiveness of white elected officials with minority influence over electoral results. It held there was no Section 2 violation in part because it believed influence districts allowed blacks to have influence on "a particular senator," and that white elected officials had "sought to further the interests" of their black constituents. App. 20.

Even assuming that to be true, Section 2 protects the access of minorities not simply to the fruits of government but to participation in the electoral process itself. For that reason, and because responsiveness is a highly subjective factor, the Senate report provides that "[u]nresponsiveness is not an essential part of plaintiff's case," and that a defendant's proof of responsiveness "would not negate plaintiff's showing by other, more objective factors" that minority voting strength was

diluted. S.Rep. No. 417, *supra*, at 29 n.116. *Accord*, H.R.Rep. No. 227, 97th Cong., 1st Sess. 30 (1981) (Section 2 "avoids highly subjective factors such [as] responsiveness"). As one court has said, the fact that "current office holders are responsive to black needs and campaign for black support is simply irrelevant to . . . [a vote dilution] inquiry; a slave with a benevolent master is nonetheless a slave." *McMillan v. Escambia County, Fla.*, 638 F.2d 1239, 1249 (5th Cir. 1981).

The decision of the lower court is paternalistic in the extreme. It assumes that blacks, no matter what they themselves may think or want, are better off being represented by officials chosen by the white majority. The court's decision denies blacks the same right of self-determination which whites exercise as a matter of course.

B. Responsiveness Is not a Continuum. The district court compounded its error in assuming, without benefit of empirical data or an evidentiary hearing, that the responsiveness of elected officials is a linear continuum along which responsiveness increases as the minority population percentage in a district increases. In his classic study of southern politics in the 1940s, V.O. Key, Jr. indicated that the presence of increased numbers of blacks in a jurisdiction was associated with white backlash and greater levels of turnout by whites who felt their dominance threatened. *See* V.O. Key, Jr., *Southern Politics in State and Nation* 516 (1984) ("almost everywhere the figures suggest that when other conditions are the same the presence of a substantial Negro population brings with it a higher level of white voting"). Increasing the percentage of blacks in a district could therefore have a *negative* effect on minority influence and the responsiveness of elected officials, with the more heavily black districts being represented by the most conservative, least

responsive white legislators. Key, *supra*, at 43 ("the backbone of southern conservatism may be found in those areas with high concentrations of Negro population").

William R. Keech, writing in 1968, modified Key's hypothesis in light of increased black voter participation in the South following passage of the Voting Rights Act. Keech posited a curvilinear relationship with districts with few blacks producing relatively liberal representatives, and districts with greater numbers of blacks electing conservative legislators, until the black population was large enough to be an effective voting majority. According to Keech:

> Up to about 30 percent of the electorate Negro the relationship would be positive because the threshold of white resistance seems to be about 30 percent of the population Negro. Between 30 percent and 50 percent of the electorate Negro, the relationship might become neutral or negative, because white resistance will be higher in communities with larger Negro population bases. Beyond 50 percent of the electorate Negro the relationship will become positive again because . . . a Negro voting majority can overcome a lot of white resistance.

William R. Keech, *The Impact of Negro Voting: The Role of the Vote in the Quest for Equality* 101 (1968).

More recent studies have confirmed the Key-Keech analysis. Michael Combs, John Hibbing, and Susan Welch found that a curvilinear pattern characterized the voting patterns of Democrats in the South, with a decrease in responsiveness in districts falling in the 30% to 40% black range. "Black Constituents and Congressional Roll Call Votes," 37 *West. Pol. Q.* 424-34 (1984). *Accord*, Bernard Grofman, Robert Griffin, and Amihai Glazer, "The Effect of Black Population on Electing Democrats and Liberals to the House of Representatives," 17 *Legis. Stud. Q.* 365,

373 (1992) ("there is evidence of curvilinearity in 1981 and 1989 exactly in the districts (30 to 40% black) where Keech's work would lead us to expect it"). In light of empirical social science evidence, districts with 31% to 33% black VAP can best be characterized as *negative* minority influence districts in so far as the responsiveness of white elected officials is concerned.

The erroneous influence district theory of the district court was based largely on the anecdotal and self-serving testimony of white elected officials whose seats were in jeopardy. In addition, Senator Cohen's "most probative" testimony about the Martin Luther King, Jr. bill was factually *incorrect*. Only eight senators – not 16 as Senator Cohen testified – voted against the largely symbolic bill. Another "no" vote would have had no affect on the outcome. Moreover, 12 (66%) of the 18 senators voting for the bill came from districts that were neither majority black nor "influence" districts. Tennessee Senate Journal, *supra*; Stipulations of Facts, Addendum 13; Public Acts and Resolutions of the State of Tennessee, Members of the Senate (1984). Under the district court's analysis, these senators, elected from overwhelmingly white districts, "would have been inclined to vote against the Martin Luther King" bill, App. 22, but they did not. The district court's influence theory is based on erroneous facts and is obviously deeply flawed.[6]

In view of legislative log rolling and the special dynamics of elected bodies, *e.g.*, a passionate appeal from

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[6] This is not a case in which appellants seek review of a disputed finding of fact. Rather, this is a case where a federal right has been denied based in large measure upon a patently erroneous finding by the district court. This Court should grant review because of the errors of law by the lower court, but at a minimum it should require the district court to reconsider its theory of minority influence in light of the correct facts.

a minority member could well sway white colleagues, the existence of a fourth black senator could also have produced an even greater margin of victory for the bill. Minority influence on legislative vote outcomes, far from being reduced, could be substantially enhanced by the ability of minorities to elect candidates of their choice.

The district court did an analysis of 1992 and 1994 general elections, contained in Appendix A to its opinion, to support the argument that "when a minority group comprises 25% or more of the voting age-population, members of that group will have sufficient political influence to deem that district an influence district." App. 23. However, the court's analysis does not show the patterns of white/black voting or turnout so that it is impossible to determine what the influence of black voters actually was in any of the contests.

In addition, 13 of the 16 contests from 1992 did not involve "minority influence" districts at all, *i.e.*, blacks were less than 25% of the VAP in each of the districts. App. 36-7. By definition, these contests tell us nothing about minority influence. The election in District 10 (32% black VAP) was uncontested and blacks as a consequence had no opportunity to influence the outcome. In District 28 (31% black VAP) the winner, in a field of three candidates, received 67.8% of the vote. If blacks voted as a bloc for the losers, they obviously had no influence on the outcome. If, however, they voted as a bloc for the winner they also had no influence on the outcome for he would have won without their votes.

The 17 contests from 1994 analyzed by the district court are even less helpful. Not only were they not part of the trial record, but none involved a "minority influence" district, *i.e.*, a district with 25% to 55% black VAP. App. 30. However one may wish to theorize about the influence 25% of the population may have on the outcome of

an election, the court's analysis tells us nothing about the ability of blacks to influence elections for the Tennessee senate or the responsiveness of whites elected in so called influence districts.

The district court's definition of minority influence is legally incorrect and based upon erroneous facts. It also confuses responsiveness with influence over electoral results, and compounds its error by ignoring the curvilinear relationship between the percentage of minority population in a district and the responsiveness of white elected officials.

III. The District Court's Influence Theory Lacks Standards and Eviscerates Section 2

The court's theory of minority influence is standardless and unworkable. The court defined an influence district as one that contained a 25% to 55% black VAP, but it also held that a "weak influence district" could exist when a minority group consisted of less than 25% of the VAP. App. 18. Given this definition(s), an influence district is whatever a court decides is an influence district. The wide range of possibilities for the existence of a minority influence district makes the district court's definition "inherently standardless." *Holder v. Hall, supra,* 114 S.Ct. at 2588, 2590 (O'Connor, J., concurring in part and concurring in the judgment).

The concept of minority influence has been criticized by social scientists as being "murky" and lacking an ascertainable threshold. *See* Bernard Grofman, Lisa Handley, and Richard G. Niemi, *Minority Representation and the Quest for Voting Equality* 117-18 (1992) ("Where there are 'electability' claims at issue, there is a natural threshold. Without such a threshold, how does one decide whether shifting minorities from one district to another increases or decreases their overall influence?"). The decisions of

this Court defining minority influence districts in terms of "predictable" or "probable" majority crossover support and the resulting ability of minorities to elect candidates of their choice embody an ascertainable standard. *See, e.g., Voinovich v. Quilter, supra,* 113 S. Ct. at 1155; *Thornburg v. Gingles, supra,* 478 U.S. at 89 n.1. The district court's definition of a minority influence district embodies no standard at all.

Suppose, for example, that each of the three minority influence districts in the state's plan contained a black VAP of only 30%, or 25%, or 15%. In each instance, according to the district court, blacks would have influence over elections but how significant would that influence be? Would each of the plans comply with Section 2?

What if the state's plans contained only two minority influence districts, or only one, would the plans violate Section 2? What if the state's plans contained only two, or only one, majority black districts but two or three or four minority influence districts, would the plans satisfy Section 2? There is no discernable standard based on influence for determining whether one or more of these plans would satisfy Section 2 and others would not.[7]

A. The State Could Even Eliminate Existing Majority-Minority Districts. Perhaps the most serious problem with the court's influence theory analysis is that it would allow the state to eliminate some or even all of the three existing majority black senate districts in favor of more influence districts, and thereby eviscerate Section 2. While the court said perfunctorily in a footnote that

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[7] The difficulty in applying the district court's decision is even more apparent if one attempts to take into account the existence of "weak influence districts." For example, would two weak influence districts equal one regular influence district? Would four weak influence districts equal one majority-minority district? The district court's decision provides no answer.

"the facts in this case require some majority-minority districts," App. 24 n.11, it established no limits whatever on the use of influence districts in lieu of majority-minority districts. There is nothing in the district court's opinion to stop the state from eliminating some of the existing majority black senate districts. Surely such a result would be wrong given the facts of this case and the requirements of Section 2, but it is a result that would be permissible under the district court's decision.

This is the first lower court decision importing such a radical new concept of influence into Section 2. Because of its extraordinary potential to destroy the beneficial remedies intended by Congress in Section 2 cases, this Court has a duty to announce or reject this new and (in appellants' view) outlandish reinterpretation of the statute.

IV. Total Population Is a Proper Measure of Proportionality in this Case

The three judge court ruled that Section 2 required the use of minority VAP rather than total population in measuring proportionality. It held:

> the statute uses the word 'electorate' and that we should measure the proportionality of black representation on the basis of black voting age population (the 'electorate') rather than total black population.

RWTAAAC I, 836 F.Supp. at 462; App. 4. In *Johnson v. De Grandy, supra*, however, this Court held that there is no requirement that VAP be used to the exclusion of total population, but that the measure of proportionality must depend on an analysis of the relevant facts and circumstances.

The Court held that because "proportionality may vary with other facts . . . [n]o single statistic provides

courts with a short-cut to determine whether a set of single-member districts unlawfully dilutes minority voting strength." 114 S.Ct. at 2661-62. And because the probative value of the degree of proportionality will vary depending on the totality of factors,

> 'there is no indication that Congress intended to mandate a single, universally applicable standard for measuring undiluted minority voting strength, regardless of local conditions and regardless of the extent of past discrimination against minority voters in a particular State or political subdivision.'

114 S.Ct. at 2661 n. 17 (*quoting Thornburg v. Gingles, supra,* 478 U.S. at 94-5, O'Connor, J., concurring in judgment).

Thus, in determining proportionality, there is no "single statistic" applicable in every case. Instead, a court should examine the totality of facts and circumstances to determine whether total population or voting age population is the best measure of whether a minority group has the equal opportunity to participate in the political process and elect representatives of its choice. 114 S.Ct. at 2663. In this case, the three judge court erred in holding that VAP was the exclusive measure of proportionality under Section 2.

First, there is a substantial difference between the total African-American population and the African-American VAP in the state, including in west Tennessee. African-Americans are 16.0% of the total population of the state, but only 14.4% of the VAP. In the seven counties of west Tennessee, African-Americans are 41.6% of the total population, but only 37.9% of the VAP.

Second, based on the facts and circumstances of this case, 14.4% is not an accurate enumeration of the state's African-American VAP. In legislative redistricting, the state accepted and took into account the census bureau's estimates that "African-Americans were undercounted in

the 1990 census by 4.8% while non-blacks were undercounted by 1.7%" Brief of Defendants in Support of Motion to Alter or Amend Judgment in *Langsdon v. Millsaps*, No. 92-2415 (W.D.Tenn), at 12. The admitted undercount, upon which the state relied in redistricting, should be taken into account as a factor in determining the relevant population for purposes of establishing proportionality.

Third, given the fact that total population was used in the redistricting process to determine district size, it would be arbitrary to apply a more restrictive standard based upon VAP in determining racial fairness. An additional majority-minority district in west Tennessee would result in a total of four majority African-American districts in the 33 member state senate, or 12.1% of the total seats. African-Americans would be underrepresented as measured by VAP (14.4%), but the lack of proportionality would be even greater as measured by total population (16%).

As *De Grandy* provides, using VAP to measure proportionality is not required by Section 2. Using VAP as the exclusive measure in this case serves no purpose other than to disguise or minimize the lack of representative fairness in the state's plan.

The use of VAP as the exclusive measure is also contrary to the requirement that Section 2 "should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination." *Chisom v. Roemer*, 111 S.Ct. 2354, 2368 (1991) (*quoting Allen v. State Board of Elections*, 393 U.S. 544, 567 (1969)). The district court erred in concluding that it was required by Section 2 to use VAP.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and set this case for argument.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., et al.,	)	
Plaintiffs,	)	No. 92-2407-TUBRO
v.	)	(Filed Feb. 22, 1995)
NED MCWHERTER, et al.,	)	
Defendants.	)	

OPINION OF THREE-JUDGE COURT

Before: MERRITT, Chief Circuit Judge; BROWN, Circuit Judge; and TURNER, District Judge.

MERRITT, Chief Circuit Judge. In this legislative reapportionment case under § 2 of the Voting Rights Act, 42 U.S.C. § 1973, the plaintiffs seek additional majority-black seats in the state senate for west Tennessee. In a previous decision in this case, reported as *Rural W. Tenn. African-American Affairs Council v. McWherter*, 836 F. Supp. 453 (W.D. Tenn. 1993), *vacated*, 114 S. Ct. 2775 (1994) [hereinafter *Rural West I*], having found a violation of § 2, we required substantial statewide proportionality of majority-black districts to black voting-age population, and we awarded the plaintiffs one such additional seat in west Tennessee on proportionality grounds, as explained at length in our earlier reported opinion.

The State appealed our decision to the United States Supreme Court. The Court reversed and vacated our decision and remanded the case to us for reconsideration in light of *Johnson v. De Grandy*, 114 S. Ct. 2647 (1994).

In our previous decision, we focused on statewide proportionality rather than regional proportionality in west Tennessee, and we stated one of the key questions at issue as follows:

> When a choice is between two or more black 'influence' districts, most likely represented by whites, versus one majority black district represented by a black, what does § 2 require in geographical areas of racially polarized block voting with a history of prior racial discrimination?

Rural West I, 836 F. Supp. at 465. We construed *Thornburg v. Gingles*, 106 S. Ct. 2752 (1986), to require the state to engage in affirmative action based on race in such situations by establishing majority-black districts in substantial proportion to the black voting-age population of the state. We held that "influence" districts would not be sufficient and could not be counted in the proportionality calculus.

We now conclude that the Supreme Court clarified its view in *Johnson v. De Grandy*, and we reverse our previous view requiring the State to establish an additional majority-black senate seat in west Tennessee. In *De Grandy* the Court appears to have held (1) that in reviewing a legislative apportionment plan, the proportion of majority-black districts to black population "is always relevant evidence

in determining vote dilution, but is never itself dispositive," *De Grandy*, 114 S. Ct. at 2664 (O'Connor, J., concurring and summarizing the holding of the Court), and (2) that a federal reapportionment court should focus on regional proportionality rather than statewide proportionality where that is the evidentiary focus of the parties in their proof in the case.

I. Previous Proceedings

Following the tabulation of the 1990 Census, the Tennessee legislature adopted 1992 Tenn. Pub. Acts 826 [hereinafter the 1992 Plan] which provided for reapportionment of Tennessee's thirty-three state senate districts.[1] Under the 1992 Plan, three of these districts are so-called "majority-minority districts" – in other words, blacks comprise over 55% of the voting-age population in each of those districts. Two of these majority-minority districts are in Shelby County in southwest Tennessee; the third is in the middle of the state in Nashville. In addition, the 1992 Plan created three more districts in which blacks constitute over 25% of the voting-age population. Two of these districts are in west Tennessee and the third

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[1] The Tennessee Constitution provides that a reapportionment plan may create up to 33 senate districts. It states that the Senate may have no more than one-third the number of seats in the House of Representatives. The state Constitution also provides that the House will have 99 seats. Tenn. Const. art. II, §§ 5, 6. Each state senator serves a four-year term, but half of the senate districts come up for election every two years. In 1992, senators in even-numbered senate districts were elected. In 1994, odd-numbered districts came up for election.

is in southeastern Tennessee and includes part of Chattanooga.

The Rural West Tennessee African-American Council filed suit in our court shortly after the passage of the 1992 Plan, claiming that the plan violated § 2 of the Voting Rights Act in that it caused vote dilution. The plaintiffs' central argument rested on the fact that blacks constitute 14.4% of Tennessee's voting-age population, but only 9.1% (3 of 33) of Tennessee's state senate districts are majority-minority districts under the 1992 Plan. In *Rural West I* we agreed with the plaintiffs and ordered the Tennessee legislature to draw a new districting plan with at least four majority-minority districts. Adding one more such district, we reasoned, would mean that 12.1% of the senate districts would be majority-minority districts. If we had required the legislature to add a fifth majority-minority district, as the plaintiffs requested, then 15.2% percent of the districts would have been majority-minority districts, a figure slightly higher than the 14.4% of the voting-age population that is black. We decided not to order the legislature to create a fifth district because to do so would "provide slightly more representation than the state's black voting-age population requires. . . . The issue of creating a fifth black Senate district should be left to the political judgment of the legislature. It is not required by federal law." *Rural West I*, 836 F. Supp. at 467. The implementation of our ruling was stayed pending an appeal to the Supreme Court.

The Supreme Court vacated and remanded our decision in *Rural West I*, 114 S. Ct. 2775 (1994). The Court ordered us to reconsider our holding in light of its recently decided case, *Johnson v. De Grandy*, 114 S. Ct.

2647 (1994). We should also note that since this case was first filed, Tennessee has held the 1992 and 1994 senate elections under the 1992 Plan. Given the Court's holding in *De Grandy*, we now believe that the 1992 Plan conforms to the Voting Rights Act.

II. Factual Findings

We note at the outset that we believe all of our factual findings in *Rural West I* to be correct, but we now reconsider our analysis of one of the plaintiffs' factual assertions. In order to assert a § 2 voting rights claim, a plaintiff must as a threshold matter demonstrate the existence of the there "Gingles preconditions." In *Thornburg v. Gingles*, the Supreme Court established a three-part test that a plaintiff must satisfy at a minimum before a court may inquire further into a voting rights claim. Those preconditions provide that:

> 1. The plaintiffs must demonstrate that the protected group is sufficiently large and geographically compact that it could constitute an effective majority in a single-member district.
>
> 2. The plaintiffs must show that the protected group is politically cohesive.
>
> 3. The plaintiffs must show that the majority votes sufficiently as a bloc to enable it usually to defeat the protected group's preferred candidate.

Gingles, 106 S. Ct. at 2766-67. The presence of the first two preconditions was not contested by the parties, and after some analysis we agreed that the plaintiffs had demonstrated the presence of the third precondition. *Rural West*

I, 836 F. Supp. at 456-60. We hold that today all three *Gingles* preconditions are still satisfied.

Nonetheless, once a court has determined that plaintiffs have demonstrated the presence of the *Gingles* preconditions, it must then proceed to examine the "totality of the circumstances." The "totality of the circumstances" language originates in the statutory text itself.[2] In order to assist courts in evaluating the totality of the circumstances, the Senate Judiciary Committee listed several factors in the legislative history of the 1982 amendments to the Voting Rights Act.[3] We concluded in *Rural West I* that the plaintiffs demonstrated a history of official discrimination in voting; racial polarization in voting; effects

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[2] § 2(b) provides:

> A violation . . . of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected class of citizens] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered; *Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(b)

[3] The factors for consideration listed in the Senate report are:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the

of discrimination in such areas as education, employment, and health; and that black candidates had not

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right of members of the minority group to register, vote, or otherwise to participate in the political process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors which in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting or standard, practice or procedure is tenuous.

S. Rep. No. 417, 97th Cong., 2d Sess. 28-29, *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07 [hereinafter Senate Report].

achieved sufficient electoral success. On the other hand, we found insufficient evidence to conclude that there were racial appeals in campaigns, or that elected officials were unresponsive to their black constituents. Finally, we found it difficult to evaluate the state's interests in adopting the 1992 plan in the context of a § 2 claim. *Rural West I*, 836 F. Supp. at 460-65. Significantly, however, we confined our evaluation of the "totality of the circumstances" to those factors listed in the Senate Report. Nonetheless, based on the *Gingles* preconditions and the factors listed in the Senate Report we found that the 1992 Plan violated § 2 of the Voting Rights Act. With one exception, our analysis of the considerations enumerated in the Senate Report remains valid. But, we amend our finding on whether black candidates have achieved sufficient electoral success.

In light of *De Grandy*, we now believe that we erred in two respects in considering the "totality of the circumstnaces" in *Rural West I*. First, we deliberately, but improperly, excluded consideration of "influence districts" when we weighed the "totality of the circumstances." Second, in evaluating the seventh factor listed in the Senate Report, "the extent to which members of the minority group have been elected to public office in the jurisdiction," as well as in fashioning a remedy, we did not correctly apply the concept of "proportionality." We now address each of these issues in turn.

III. Influence Districts

In our prior decision, we gave extensive consideration to the defendants' argument that we should consider as part of the totality of the circumstances the several influence districts which exist under the 1992 Plan. Ultimately we decided that the Voting Rights Act does not recognize influence districts. *Rural West I*, 836 F. Supp. at 465-66. Upon reconsideration, we now reach a different conclusion. The population of an influence district, as its name suggests, includes sufficient members of a minority group to influence substantially an election, but not enough to comprise a majority or super-majority as is necessary for a majority-minority district. While we have defined a majority-minority district as having at least a 55% minority voting-age population, 836 F. Supp. at 467, an influence district exists when members of a minority group compose 25% or more of the voting-age population of a district. In some cases, an influence district may also exist when a minority group consists of less than 25% of the voting-age population of a district.

The issue of influence districts may arise in voting-rights jurisprudence in two distinct contexts. It will be useful to distinguish these two situations before proceeding further.

Most commonly, plaintiffs have contended that § 2 may mandate the creation of influence districts in certain situations. Frequently this argument has been advanced in cases in which the minority group in question does not have sufficient population to comprise a majority in a majority-minority district, but nonetheless wants to be part of an influential minority in a single district. If the

members of a minority group taken together can only comprise 35% of the voting-age population of one district, no matter how the district is drawn, then it is clear that they do not satisfy the first *Gingles* precondition that requires that "the plaintiffs must be able to demonstrate that the protected group is sufficiently large and geographically compact that it could constitute an effective majority in a single member district." *Gingles*, 106 S. Ct. at 2766. This issue of whether § 2 may require the creation of an influence district can also arise when a minority group does have sufficient population to satisfy the first *Gingles* precondition but that population is already largely included within majority-minority districts. In such a case, plaintiffs may argue that the remainder population, not included in a majority-minority district, and not numerous enough to form an additional majority-minority district must be grouped together to form an influence district rather than be divided in small numbers among other districts. Again, members of this remainder population cannot satisfy the first *Gingles* precondition.

Most courts have rejected the contention that § 2 entitles minority groups to an influence district even if they cannot satisfy the first *Gingles* precondition. *See Latino Political Action Comm., Inc. v. Boston*, 784 F.2d 409 (1st Cir. 1986); *DeBaca v. County of San Diego*, 794 F. Supp. 990 (S.D. Cal. 1992), *aff'd*, 5 F.3d 535 (9th Cir. 1993); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991); *Skorepa v. Chula Vista*, 723 F. Supp. 1384 (S.D. Cal. 1989). Only one court has recognized that § 2 may require the creation of influence districts. *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991). Another court held that a plaintiff would not have to satisfy the *Gingles* "effective

majority" precondition when he could demonstrate intentional discrimination. *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991). Despite this difference of opinion on when or if § 2 requires legislatures to create influence districts for minority groups, the Supreme Court on four separate occasions has refused to rule on the issue. *De Grandy*, 114 S. Ct. at 2656; *Voinovich v. Quilter*, 113 S. Ct. 1149, 1155 (1993); *Growe v. Emison*, 113 S. Ct. 1075, 1085 n.5 (1993); *Thornburg v. Gingles*, 106 S. Ct. at 2764 n.12. Thus the law remains unsettled on this question. Nonetheless, the problem of whether the Voting Rights Act *requires* the creation of influence districts does not arise in the present case.

Influence districts may also arise in the context of § 2 cases when a court evaluates the "totality of the circumstances." In this posture, the question is not whether the Voting Rights Act requires the creation of influence districts, but whether the voluntary creation of influence districts by a legislature should be counted as a factor weighing against finding a § 2 violation. To date, other than our own previous decision, there have been no cases that explicitly address this issue. Because it arises in the case now before us, we extrapolate from Supreme Court precedent to determine whether influence districts should be counted in evaluating the totality of the circumstances.

As a threshold matter, we note that the *De Grandy* Court reemphasized that the inquiry into the "totality of the circumstances" must be based on "a searching practical evaluation of the 'past and present reality.' " *De Grandy*, 114 S. Ct. at 2660 (quoting Senate Report at 208).

Thus, the Court has instructed that the inquiry should be quite broad and take into account as many relevant factors as possible in evaluating the "totality of the circumstances." It should not be limited merely to the factors listed in the Senate Report. Therefore, the degree to which minority voters can claim strong or weak influence in districts other than majority-minority districts certainly should be included in the calculus.

In addition, the Supreme Court has suggested in several instances that considering influence districts is appropriate. The fundamental interpretive question at stake revolves around the meaning of the clause in § 2 which provides that a Voting Rights Act violation exists when members of a minority group have "less opportunity than other members of the electorate . . . to elect representatives of their choice." 42 U.S.C. § 1973(b). The plaintiffs in the present case have argued that black voters do not have the opportunity to elect representatives of their choice if they are not part of a 55% black majority within a district. In other words, according to the plaintiffs, unless black voters have the opportunity to elect their first-choice candidate, a black candidate, they do not have the opportunity to elect a candidate of their choice at all. But the *De Grandy* Court rejected this interpretation of § 2 when it stated:

> [F]or all the virtues of majority-minority districts as remedial devices, they rely on a quintessentially race-conscious calculus aptly described as the "politics of second best." . . . If the lesson of *Gingles* is that society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure

> the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.

De Grandy, 114 S. Ct. at 2661. When minority voters can influence elections, they have the opportunity to "pull, haul and trade to find common political ground." When such an opportunity exists, they are obliged to use it. We should not reject the existence of influence districts as irrelevant under § 2.

This statement in *De Grandy* accords with earlier decisions of the Court. In *Voinovich v. Quilter*, the Court also questioned whether the creation of majority-minority districts is the only means through which minority voters can be given the opportunity to vote for candidates of their choice:

> [T]he creation of majority-minority districts[ ] does not invariably minimize or maximize minority voting strength. Instead, it can have either effect or neither. On the one hand, creating majority-black districts necessarily leaves fewer black voters and therefore diminishes black-voter influence in predominantly white districts. On the other hand, the creation of majority-black districts can enhance the influence of black voters.

Voinovich, 113 S. Ct. at 1156. The *Voinovich* Court recognized, as we did in *Rural West I*, that in some cases the creation of majority-minority districts can actually weaken the influence a minority group has on the legislative process. *See Rural West I*, 836 F. Supp. at 465-66.

Furthermore, in *Chisom v. Roemer*, 111 S. Ct. 2354 (1991), the Supreme Court rejected "the erroneous assumption that a small group of voters can never influence the outcome of an election." *Id.* at 2365 n.24. This statement was made in response to an argument presented in dissent by Justice Scalia. The Court held that in order to demonstrate a § 2 violation, the plaintiffs would have to demonstrate they had been deprived of both their opportunity "to participate in the political process," *and* "the opportunity to elect representatives of their choice." Justice Scalia responded that such a reading would leave small minority groups who had been denied the opportunity to participate with no protection under the Voting Rights Act. Small groups would never be able to demonstrate that they had been denied the opportunity to elect representatives of their choice because their size would prevent them from ever having such an opportunity. Thus members of small minority groups who had been denied access at the polls would have no redress. The Court answered that small groups of voters can influence an election, and thus could meet the second requirement of the statute. In making this argument, the Court explicitly recognized that at least in the *Chisom* context the phrase "elect representatives of their choice" may be read as meaning having the ability to influence the outcome of an election.

Finally, in *Gingles*, Justice O'Connor's concurrence raised the issue of whether influence districts may be considered by courts together with majority-minority districts in assessing a voting rights claim. She asked, "Is the 'voting strength' of a racial group to be assessed solely with reference to its prospects for electoral success, or should courts look at other avenues of political influence open to the racial group?" *Gingles*, 106 S. Ct. at 2785 (O'Connor, J., concurring). The Court's jurisprudence since *Gingles* has not answered this question explicitly, but, to remain consistent with recent cases, we believe that courts should consider the existence of "other avenues of political influence" besides majority-minority districts.

The plaintiffs in this case have presented only one argument as to why influence districts should be ignored under an analysis of the "totality of the circumstances." They point to the legislative history of the 1982 amendments to the Voting Rights Act and cite statements by opponents of the amendments who argued that § 2 would effectively require courts to create majority-minority districts under a quota system (a system of proportional representation). In particular, the plaintiffs point to the objections of Senator Orrin Hatch and the Subcommittee on the Constitution. Senate Report at 94-105, 107-87. The plaintiffs argue that the opponents of the bill presented arguments for a more flexible understanding of § 2 which would allow for consideration of influence districts. Because the opponents of the amendments lost, the plaintiffs contend that Congress rejected their arguments. Consequently, the plaintiffs would have us believe that Congress adopted a law that recognizes only the presence

or absence of majority-minority districts, and does not permit courts to consider influence districts in the calculus of evaluating voting rights claims.

Plaintiffs have misread the legislative history. The relevant sections of the legislative history concern a debate on a portion of § 2 that was eventually adopted called the Dole Proviso that states "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." Senator Hatch and the Subcommittee Report objected that the Dole Proviso simply would not be effective at achieving what its authors intended. Senator Hatch argued that despite the language expressly rejecting a requirement of proportional representation, the Dole Proviso would "fail to overcome the clear and inevitable mandate for proportional representation." *Id.* at 96. He believed that adopting the "results test" would require courts to impose proportional representation through the remedial phase, and thereby force courts to ignore the language disclaiming proportional representation.

The Subcommittee on the Constitution, chaired by Senator Hatch, considered an earlier version of the Dole Proviso proposed in the House of Representatives known as the "disclaimer provision." The Subcommittee disagreed with the conclusions of a House report which stated that the disclaimer provision would prevent § 2 from being construed as creating a right to proportional representation. The Subcommittee called the House conclusions "a misleading and irrelevant comment on the likely effect of the statutory reference to proportionality." *Id.* at 142. The Subcommittee Report went on to cite

favorably the comments of Professor Irving Younger, who testified that "the disclaimer [would] likely be wholly ineffective because it is 'simply incoherent.' . . . 'If enacted, that saving sentence will either be rewritten by the courts or ignored, in either event dishonoring Congress' responsibility to write the Nation's laws.' " *Id.* at 145. In short, Senator Hatch and the Subcommittee believed that the amendments to § 2 would require proportional representation irrespective of any express language to the contrary included in the statute.

As we read the legislative history, the majority rejected Senator Hatch's arguments that the Dole Proviso would be ineffective. Those who voted in the majority believed the Dole Proviso would have efficacy because its express command would be sufficient to prevent courts from imposing a right to proportional representation. Whether the majority or Senator Hatch was correct is not for us to decide. Instead, we simply note that the legislative history does not speak at all to what role influence districts should play in voting rights claims. In addition, both proponents and opponents of the 1982 amendments agreed that § 2 should not require proportional representation. They disagreed on how best to accomplish that purpose. Thus nothing in the legislative history even hints that consideration of influence districts would be improper.

Before analyzing the role that influence districts play in the 1992 reapportionment of the Tennessee Senate, it is necessary to define at what point a minority group gains sufficient influence in an electoral district for recognition under § 2. Some have argued for a highly particularized definition of an "influence district" that takes into

account the degree of racial polarization in a specific district, the outcome of individual elections and the actual ability of minority voters to build coalitions within a district. *See* J. Morgan Kousser, *Beyond* Gingles: *Influence Districts and the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F.L. Rev. 551 (1993). While such inquiries might provide the most precise measurements of the degree of influence exercised by a minority group within a particular district, they will vary from election to election. In a close election between two candidates in a predominantly white district in which each had the support of 49% of the population, a 2% minority population could decide the election by throwing its support to one of the two candidates. In such a situation, that minority group would have tremendous influence on the outcome of the election. But in the same district in another election, the same 2% of the population might be entirely irrelevant to the outcome if the contest were not as close. Thus courts would be obliged to engage in a new analysis every election. This would effectively make evaluation of influence districts unworkable.

Instead, we favor adoption of a standard rule that any district in which a minority group composes 25% to 55% of the voting-age population be considered an influcence district.[4] Standard rules enhance consistency,

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[4] We do not address whether a district in which minorities comprise less than 25% of the voting-age population can never be considered an influence district, even when proof presented by the parties leads to the opposite conclusion. Although two districts that might be called "weak influence districts" exist under the 1992 Plan, we have no need to include them in our calculation of the totality of the circumstances.

manageability, predictability and uniformity. Cases that involve elections and voting patterns often may require complex calculations which integrate many factors. Rather than continually wade through a morass of statistical information about electoral districts, in many instances courts have established standard rules. In the one-person, one-vote context, the Supreme Court has established a 10% *de minimis* rule that allows the deviation in population between state legislative electoral district to vary up to 10% before an Equal Protection claim becomes cognizable. *Brown v. Thomson*, 462 U.S. 835, 842 (1983). Furthermore, in the § 2 context, courts already use a threshold minimum percentage of the voting-age population to determine whether a majority-minority district exists (even though they do not always agree on what that percentage should be). *Rural West I*, 836 F. Supp. at 467 (stating that majority-minority district requires minority group comprises at least 55% of voting-age population in district). *But see Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984) (establishing 65% as minimum minority population necessary for majority-minority district).[5]

We are confident that a minority population that votes as a bloc (as required by the second *Gingles* precondition) and comprises at least 25% of the voting-age population in an electoral district will have significant

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[5] In *Rural West I* we noted that courts have not agreed on what the minimum percentage of minorities necessary for majority-minority district should be. No bright-line rule exists common to all courts. Yet every court has established a standard rule to avoid engaging in a district-by-district analysis of whether a minority group constitutes an "effective majority." *Rural West I*, 836 F. Supp. at 467.

influence on candidates in virtually every election. A serious candidate for office cannot ignore 25% of the population that tends to vote as a bloc. An analysis of the two Tennessee Senate elections conducted under the 1992 Plan supports this conclusion. In the 1992 and 1994 elections combined there were twenty-one contested senate races.[6] In every contested race, if 25% of those who voted had changed their votes from the winning candidate to the losing candidate, they would have reversed the results of the election. Furthermore, in fifteen of the twenty-one contested races, if 25% of those who voted and also cast ballots for the winning candidate withdrew their support and did not vote at all, they would have changed the outcome of the election. Realities such as these are difficult for candidates to ignore. *See Abigail Thernstrom, Whose Votes Count? Affirmative Action and Minority Voting Rights* 109 (1987) (discussing influence of black voters on U.S. Senator Strom Thurmond).

Testimony from two senators who represent districts with black populations over 20% reinforces the conclusion that a minority group does not need a majority to have influence on an election on a particular senator. Senator John Wilder, who is white, represents District 26 which has a 21% black voting-age population. Senator Wilder testified convincingly that he has sought to further the interests of his black constituents by sponsoring

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[6] For the purposes of this analysis, contested races include only races with a Democratic and Republican candidate in the general election. Races in which either a Democrat or a Republican faced opposition only from Independent or write-in candidates we did not consider "contested" because no Independent or write-in candidate received a significant portion of the vote.

and supporting particular projects of interest to them. (Trial Tr. at 851-54). He also observed that in one recent primary election, he defeated two black challengers, receiving substantial support even in predominantly black communities. (Trial Tr. at 842-44, 928-32). In addition, Senator Wilder recounted how as Speaker of the Senate he had used his authority to ensure that black senators became chairmen of committees. (Trial Tr. at 848-49). Regardless of whether he is opposed by a white candidate or a black candidate, Senator Wilder testified that he always works hard for the support of the black community and is strongly influenced by their interests. (Trial Tr. at 845-46). Even though the 21% black population in District 26 does not suffice to meet our definition of an influence district, it is clear that his black constituents have great influence on Senator Wilder and on the outcome of elections in his district nonetheless. Without the support of black voters he could not be assured of reelection. (Trial Tr. at 846).

Senator Stephen Cohen represents District 30 which has a 33% black voting-age population. Senator Cohen, who is white, testified that without the support of black voters he most likely would have lost races in 1988 and 1992, both of which he won. (Trial Tr. at 888-89). He described how he has received support from prominent black leaders in his district and how he campaigns in black communities within his district. (Trial Tr. at 889-90, 892). Like Senator Wilder, it is clear that black voters choose to vote for Senator Cohen, actively support him, and in turn can expect that he will represent their interests in the Tennessee Senate.

The most probative aspect of Senator Cohen's testimony, however, concerned the role that senators elected from influence districts play in the political dynamics of the Senate. Specifically Senator Cohen persuasively testified that adding an additional majority-minority district in western Tennessee would actually reduce the influence of black voters in the Tennessee Senate. He cited as an example the legislative proposal to make the birthday of Martin Luther King a state holiday, a bill which passed the Senate by only one vote (17 to 16). Senator Cohen and another senator who represents a district with a substantial black population in west Tennessee both voted for the bill. Senator Cohen argued that by removing the black voters from the influence districts to create a new majority-minority district, at least one more conservative white senator would also be elected. This new conservative senator, elected from an overwhelmingly white district, would be uninfluenced by black voters and would have been inclined to vote against the Martin Luther King holiday, a measure strongly favored by black voters but opposed by many white voters in west Tennessee. As a consequence the measure would not have passed. (Trial Tr. at 920-23).

In addition, Senator Cohen named several other issues of interest to the black community which would not have passed if his influence district and another district with significant black population had been eliminated to form a majority-minority district. In particular, he cited a gambling bill and several funding bills of special concern to his district. (Trial Tr. at 922, 954-55).

Based on the statistical results of the 1992 and 1994 elections, as well as the testimony of two members of the

senate, when a minority group comprises 25% or more of the voting-age population, members of that group will have sufficient political influence to deem that district an influence district. A serious political candidate cannot ignore such a sizable portion of the electorate. Furthermore, Senator Cohen's testimony reveals that black voters in west Tennessee will be able to achieve their political aims more effectively with a combination of majority-minority districts and influence districts as opposed to only majority-minority districts. The voting patterns within the influence districts also reveal cross-racial support for candidates, which means that racial polarization has been reduced somewhat in those districts, a result that comports with the goals of the Voting Rights Act.

The 1992 Plan creates three majority-minority districts in which blacks comprise at least 55% of the voting-age population.[7] In addition, the Plan provides three influence districts in which the voting-age population is at least 30% black.[8] Finally, there are another two districts in which the voting-age population is over 20% black, but less than 25% black.[9] Considering only the three majority-

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[7] For the reasons stated in *Rural West I*, 836 F. Supp. at 467, we continue to use 55% as the minimum voting-age population necessary for a majority-minority district. District 19 has a 58% black voting-age population; District 29 has an 83% black voting-age population; and District 33 has a 69% black voting-age population.

[8] District 10 has a 32% black voting-age population; District 28 has a 31% black voting-age population; and District 30 has a 33% black voting-age population.

[9] Districts 26 and 27 each have a 21% black voting-age population.

minority districts and the three influence districts, we cannot say based on the totality of the circumstances that the 1992 Plan violates § 2 of the Voting Right Act.[10] Together these six districts comprise 18.2% of all districts. We reach this decision even though the plaintiffs have demonstrated that the 1992 Plan does not result in proportionality, that the *Gingles* preconditions have been met, and that several factors listed in the Senate Report exist.

Black voters in the influence districts have not necessarily been deprived of the opportunity to vote for candidates of their choice, even if they do not always have the opportunity to elect what some consider a perfect candidate, *i.e.*, a candidate of their own race. Furthermore, the plaintiffs have not demonstrated that replacing two of the influence districts with one majority-minority district would reduce vote dilution. To the contrary, it appears as though black voters might have more influence on the legislative process with two strong influence districts than they would with one additional majority-minority district.[11] Thus, when it is not demonstrated by the

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[10] If we were to consider all five districts in which blacks comprise over 20% but less than 55% of the voting-age population, our conclusion would be even stronger. Although we do not think the two districts with black voting-age populations between 20% and 25% are irrelevant to a consideration of the totality of the circumstances, we do not need to include them to reach the conclusion that we do.

[11] We do not imply that the legislature could adopt a plan under current circumstances with no majority-minority districts at all if it created a sufficient number of influence districts. Under current doctrine, the facts in this case require some majority-minority districts.

evidence that a reapportionment plan violates federal law, we must defer to the political decisions made by the elected legislature. *See Upham v. Seamon*, 456 U.S. 37, 41 (1982); *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978); *Connor v. Finch*, 431 U.S. 407, 414-15 (1977); *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973); *Burns v. Richardson*, 384 U.S. 73, 84-85 (1966); *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). Consequently, we hold that the 1992 Plan does not violate § 2 of the Voting Rights Act.

IV. Proportionality

Our decision on influence districts is reinforced by a reanalysis of the role of proportionality in § 2 cases. We conclude that § 2 of the Voting Rights Act does not require proportionality. In this case to require proportionality would be tantamount to violating the Dole Proviso because of the particular nature of racial polarization in Tennessee, as discussed below.

Voting rights doctrine has produced two distinct, but often confused concepts to measure the degree to which members of a minority group have been denied a fair opportunity to participate in electoral processes: "proportional representation" and "proportionality." The *De Grandy* Court clarified for us the difference between them:

> "Proportionality" . . . links the number of majority-minority districts to minority members' share of the relevant population. The concept is distinct from the subject of the proportional representation clause of § 2, which provides that "nothing in this section establishes a right to

> have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b). This proviso speaks to the success of the minority candidates, as distinct from the political or electoral power of minority voters.

De Grandy, 114 S. Ct. at 2658 n.11.[12] Thus were it not for the language of the Dole Proviso, a requirement of *proportional representation* would mean that because blacks comprise 14.4% of the voting-age population, 14.4% of the elected senators must also be black. On the other hand, an obligation to create *proportionality* would mean that the percentage of blacks in the voting-age population would require 14.4% of the districts to be majority-minority districts.

We recognized in *Rural West I* that the Voting Rights Act does not require proportional representation. *Rural West I*, 836 F. Supp. at 463. We believed that the statute did require proportionality when the *Gingles* preconditions have been met and dilution of the black vote has been proven under the totality of the circumstances. In considering the totality of the circumstances, we found

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[12] The *De Grandy* Court also employed the phrase "substantial proportionality." *De Grandy*, 114 S. Ct. at 2658. Substantial proportionality exists when a legislature has created the maximum number of majority-minority districts possible without exceeding proportionality. For example, in the current case, the reapportionment plan would have to include four majority-minority districts (12.1% of the total districts) for substantial proportionality to exist because blacks are 14.4% of the total voting-age population of Tennessee. Four is the greatest number of districts that can be created without exceeding the 14.4% figure.

the mere fact that one more majority-minority district could be created without exceeding proportionality central to our holding. But, the *De Grandy* Court made clear that the Voting Rights Act requires neither proportional representation nor proportionality.

De Grandy concerned a § 2 challenge to a reapportionment plan for Florida's state senate and house of representatives. Narrowly construed, *De Grandy* held that the Voting Rights Act does not require legislatures to maximize the number of majority-minority districts, particularly when a reapportionment plan already has achieved proportionality. *De Grandy*, 114 S. Ct. at 2662-63. Yet, the *De Grandy* Court also addressed the role that proportionality plays generally in cases brought under § 2. The State of Florida argued that because under its reapportionment plan proportionality did exist, it should be immune from a § 2 attack. The Court did not accept this argument that the existence of proportionality creates a "safe harbor" for defendants. *Id.* at 2660-61.

But the Court also rejected the idea that lack of proportionality should create a "safe harbor" for plaintiffs bringing a § 2 claim. In discussing the role that proportionality plays in a vote dilution claim, the Court observed "the degree of probative value assigned to disproportionality in a case where it is shown, will vary not only with the degree of disproportionality, but with other factors as well." *Id.* at 2661 n.17. In case the Court left any doubt on this issue, Justice O'Connor, in addition to joining the Opinion of the Court, added a concurrence. She stated that "lack of proportionality can never by itself prove dilution, for courts must always carefully and searchingly review the totality of the circumstances,

including the extent to which minority groups have access to the political process." *Id.* at 2664 (O'Connor, J., concurring).

The Court's decision to interpret the Voting Rights Act as not requiring proportionality makes eminent sense. The Dole Proviso in the Voting Rights Act establishes that the Act does not create a right to proportional representation. But when extreme racial polarization exists, as in the case before us, there is no practical difference between proportional representation and proportionality. Technically, § 2 only requires that a court determine that white voters will refuse to vote for black-preferred candidates. Therefore, theoretically one could find a Voting Rights Act violation without holding that black voters will almost always choose to vote for a black candidate rather than a white candidate, if given the choice. As a practical matter, however, in most racially polarized districts where white voters prefer white candidates (as is effectively required by the third *Gingles* precondition to find a § 2 violation), black voters will choose to vote for black candidates. This is certainly true in Tennessee. *Rural West I*, 836 F. Supp. at 460 (finding 86.30% of black voters vote for black candidates in black-white elections). *But see Thernstrom, supra* at 218 (noting that some majority-black districts will continue to reelect preexisting white incumbents until they retire). Thus, in effect, a majority-minority district in which the voting-age population is at least 55% black virtually always will elect a black representative. Requiring a proportional number of majority-minority districts when racial polarization exists, therefore, essentially results in the election of a proportional number of black representatives. To

mandate proportionality under the Voting Rights Act when the Act in its own terms clearly states that it does not require proportional representation would be nonsensical.

We agree with the conclusion reached by other federal courts that findings of racial polarization and historical inequality do not alone necessarily result in a violation of § 2 of the Voting Rights Act. This is true even when a reapportionment plan does not provide for substantial proportionality. *See Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022 (D. Md. 1994); *Jeffers v. Clinton*, 730 F. Supp. 196, 215-17 (E.D. Ark. 1989), *aff'd*, 111 S. Ct. 662 (1991) (rejecting voting rights claim as to Pulaski County). The *De Grandy* Court appears to have come to the same conclusion when it noted that the district court in that case inflated "the relative importance of the *Gingles* factors and of historical discrimination, measured against evidence tending to show that in spite of these facts, [the reapportionment plan] would provide minority voters with an equal measure of political and electoral opportunity." *De Grandy*, 114 S. Ct. at 2658.

The 1992 Plan does not provide sufficient majority-minority districts to create proportionality. To reach proportionality, it would have to provide four majority-minority districts, whereas it only establishes three. We earlier considered this disparity between the black percentage of the voting-age population and the percentage of majority-minority districts to be the dominant fact in our evaluation of the totality of the circumstances. In addition, once we found a violation, we assumed that requiring proportionality would be the only potential

remedy. *Rural West I*, 836 F. Supp. at 466-67. We now recognize this to be an incorrect understanding of the law.

We addressed the proportionality issue in the context of evaluating the seventh Senate Report factor which calls for an evaluation of "the extent to which members of the minority group have been elected to public office." In making our analysis of this factor we used the concepts of proportionality and proportional representation interchangeably. But the inquiry into the "totality of the circumstances" permits consideration of both means of analysis. *De Grandy*, 114 S. Ct. at 2660-61, 2664. Consequently we believe any confusion in evaluating the seventh Senate Report factor in our earlier opinion to be harmless.[13] Finally, once we found a violation, we assumed that requiring proportionality would be the only potential remedy. *Rural West I*, 836 F. Supp. at 466-67.

Despite the overemphasis on lack of proportionality, on balance, were we still unable to consider the existence of influence districts, we would reinstate our holding in *Rural West I*. Lack of proportionality certainly plays a role in evaluating the "totality of the circumstances." Were there no influence districts included in the 1992 Plan, the lack of proportionality in this case combined with other factors would be sufficient to find that § 2 had been violated. But once we include influence districts in the

---

[13] We also note that in this case there are three majority-minority districts and three black senators (all elected from the majority-minority districts). Therefore, the analyses of proportionality and proportional representation under the 1992 Plan yield the same results.

calculus, the lack of proportionality is not significant enough to compel a holding that the 1992 Plan violates the Voting Rights Act.

IV. Regional Analysis

The defendants urge that *De Grandy* also stands for the proposition that a court should concentrate its analysis of whether a reapportionment plan violates § 2 on the geographic region presented in the proofs by the parties. In this case, the defendants correctly state that virtually all of the evidence presented in this case concerned west Tennessee. But, in *Rural West I*, we reached our holding, in part, based on statewide statistics. *Rural West I*, 836 F. Supp. at 462.

The *De Grandy* Court did not authoritatively state what frame of reference a court must use in evaluating a § 2 claim. Instead, the Court noted that the parties had "apparently agreed in the District Court on the appropriate geographical scope" – a regional rather than statewide scope. *De Grandy*, 114 S. Ct. at 2662. Because these arguments based on a statewide perspective had not been raised in the District Court, the Supreme Court treated then as waived. *Id. See also NAACP v. Austin*, 857 F. Supp. 560, 568-69 (E.D. Mich. 1994). Nothing in *De Grandy*, however, prohibits a district court from considering statewide statistics, even if the proofs largely concentrate on a particular region of a state. *Id.*

Nonetheless, we believe we should have evaluated more closely regional statistics in our earlier decision in addition to examining statewide evidence. The difficulty in using regional statistics in this case arises because

there are several equally valid ways to decide precisely which districts should be included in a regional analysis. Proofs in this case focused on seven counties in southwest Tennessee; Shelby, Tipton, Lauderdale, Fayette, Haywood, Madison, and Hardemann. Under the 1992 Plan, six senate districts fall entirely within the seven counties, and parts of two other districts are located within this region. Of the six districts which fall entirely within the seven-county region, two are majority districts and two are influence districts. Both of the districts which are partially within the region have a 21% black voting-age population.[14] Blacks comprise 37.9% of the voting-age population within these seven counties, and 41.6% of the total population.

The first means of analysis posits that this region as a whole should be entitled to either six or seven complete senate districts. If we use the total population living in this region, it would be entitled to 6.99 senate seats; when we use voting-age population it would be entitled to 6.76 seats. If we accept the defendants' claim that the region should only be entitled to the six complete seats it now has, only two of those seats must be majority-minority districts to achieve substantial proportionality in the region.[15] On the other hand if we accept the plaintiffs' argument that the region is entitled to seven complete

---

[14] Districts 28, 29, 30, 31, 32, and 33 are entirely within the seven-county region. Districts 26 and 27 fall partially within the region.

[15] The two majority-minority seats would comprise 33% of the six-seat total. Adding a third majority-minority district would raise this percentage to 50%, well above the 37.9% figure necessary for proportionality.

seats, the two existing majority-minority districts still suffice to create substantial proportionality within the seven counties.[16]

This line of reasoning could have led us in *Rural West I* to conclude that no § 2 violation exists. We recognize that *De Grandy* has stated that the existence of proportionality does not create a "safe harbor" for defendants. *De Grandy*, 114 S. Ct. at 2660-61. Nonetheless, when substantial proportionality exists, we are reluctant to interfere with the political judgments made by the legislature, absent some special circumstances not shown here. *Rural West I*, 836 F. Supp. at 467. *See also NAACP*, 857 F. Supp. at 571 (stating that "showing of persistent, proportional representation is sufficient to defeat the plaintiffs' Section 2 claims, absent proof of a racially discriminatory motivation in the drawing of the district lines.").

But another means of analyzing the region, if accepted, could lead us to conclude that substantial proportionality does not exist in those seven counties. The plaintiffs note that the seven-county region includes all or some portion of eight senate districts. The two majority-minority districts in that region comprise only 25% of the eight districts. If a third district were added, 37.5% of the districts would be majority-minority districts, slightly

---

[16] The two majority-minority districts would comprise 28.6% of the seven seats. While this is less than 37.9% (the percentage of the voting-age population that is black) adding a third seat would raise this figure to 42.9%, significantly above proportionality.

below the 37.9% figure necessary for exact proportionality. Using this analysis we would conclude that substantial proportionality does not exist.

When we include the influence districts in our analysis of the "totality of the circumstances" we find that both methods of regional analysis yield findings that § 2 has not been violated. Four of the eight district which fall at least partially within the seven-county region are either majority-minority districts or influence districts. Six of the eight districts have black voting-age populations over 20%. We conclude, as we do in our statewide analysis, that creating an additional majority-minority district at the expense of two or more districts with significant black population would not necessarily enhance black influence in the state senate and reduce vote-dilution. Instead, amending the 1992 Plan to add another black district might have the opposite effect. In sum, a consideration of the seven-county region alone does not change the outcome of our decision today.

V. Conclusion

In conclusion, we find that following the clarifications to § 2 presented in *De Grandy*, we erred in our first opinion in this case. We now recognize that § 2 does not necessarily require proportionality even when the *Gingles* preconditions have been met and when the plaintiffs have demonstrated the presence of racial polarization and a history of racial inequality. Nonetheless, were we still prevented from recognizing the existence of influence districts, we would reinstate our previous holding. But, an inquiry into "the totality of the circumstances"

should be broad and exhaustive, and, therefore, does allow for consideration of influence districts. When we now include the three influence districts in the 1992 Plan in our evaluation of the "totality of the circumstances," we find that the 1992 Plan does not violate § 2 of the Voting Rights Act.

For the foregoing reasons, it is ordered this 22nd day of February, 1995 that the Clerk shall enter a judgment for the defendants.

ENTERED BY ORDER
OF THE COURT

/s/ Gilbert S. Merritt
GILBERT S. MERRITT
UNITED STATES CHIEF
CIRCUIT JUDGE

/s/ Bailey Brown
BAILEY BROWN
UNITED STATES CIRCUIT
JUDGE

/s/ Jerome Turner
JEROME TURNER
UNITED STATES DISTRICT
JUDGE

APPENDIX A[1]

1992 Tennessee Senate General Election Results

District	Candidates	% Votes
2*†‡	Jim Holcomb (R) Wallace Ketron, Jr. (D)	55.1% 44.9%
4*†‡	Frank S. Niceley (R) Danny Wallace (D)	50.9% 49.1%
6*†	Ben Atchley (R) Steve McGill (D)	67.9% 32.1%
8*†‡	Carl O. Koella (R) Vernon Scarbrough (D) Hubert Patty (I)	53.4% 35.8% 10.8%
10	Ward Crutchfield (D)	100.0%
12*†‡	Anna Belle O'Brien (D) W. Van Hilleary (R)	51.2% 48.8%
14	Jerry W. Cooper (D)	100.0%
16	Andy Womack (D)	100.0%
18*†‡	Don Wright (R) Charles Hill Beatty (D)	50.3% 49.7%
20*†‡	Joe Haynes (D) Ben Jones (R)	59.4% 40.6%
22*†‡	Carol Rice (R) Riley Darnell (D)	50.2% 49.8%
24	Milton Hamilton (D)	100.0%
26	John S. Wilder, Sr. (D)	100.0%
28*†	Jim Kyle (D) James H. Brown, Jr. (R) Jesse E. Neely (I)	67.8% 22.7% 9.5%
30*†	Steve Cohen (D) Bill Davis (R)	62.8% 37.2%
32	Tom Leatherwood (R)	100.0%

[1] These tables rely on the official election results published by the office of the Tennessee Secretary of State. The information here does not include the number of votes received by write-in candidates, who in no case received more than .0006% of the votes combined in any one race.

* This is a "contested" race, in which both a Democrat and a Republican ran.

† In this race, had 25% of those who voted and cast votes for the winning candidate switched their vote to the second place candidate, the result of the election would have changed.

‡ In this race, if 25% of those who voted and cast votes for the winning candidate abstained from voting, the result of the election would have changed.

1994 Tennessee Senate General Election Results

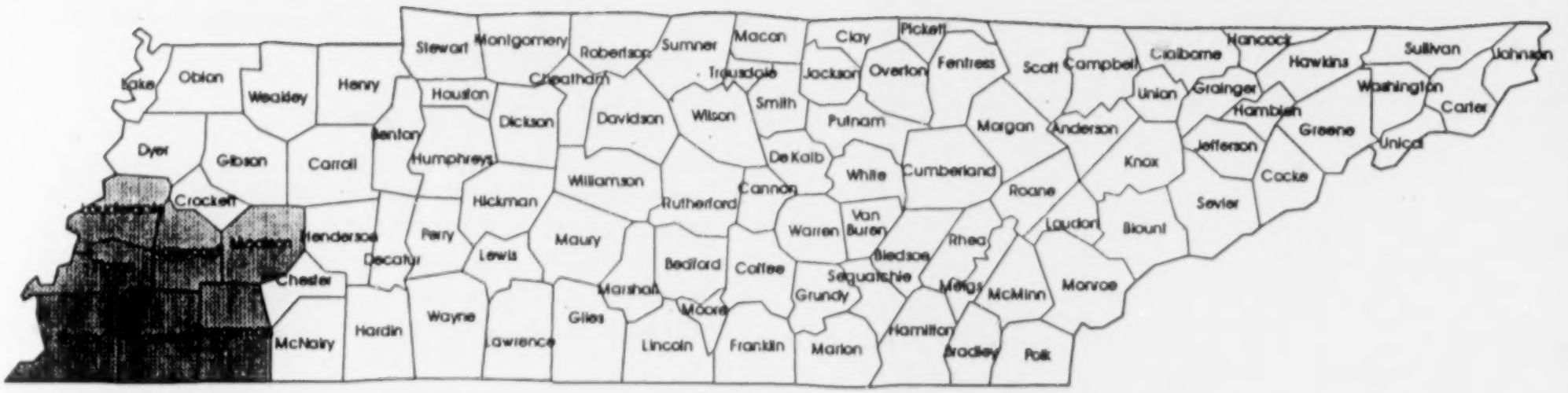
District	Candidates	% Votes
1*†	Tommy G. Haun (R) William O. (Bill) Shults (D)	64.9% 35.1%
3*†	Rusty Crowe (D) Helen Stafford Wilson (R)	66.5% 33.5%
5*†‡	Randy McNally (R) William (Bear) Stephenson (D)	52.7% 47.3%
7	Bud Gilbert (R)	100.0%
9*†	Jeff Miller (R) Larry Guy (D)	67.2% 32.8%
11	David Fowler (R)	100.0%
13*†‡	Gene Elsea (R) Jane W. Dawkins (D)	60.3% 39.7%
15*†‡	Tommy Burks (D) James H. Threet (R)	59.0% 41.0%
17*†‡	Robert Rochelle (D) Jack Bowers (R)	54.6% 45.4%
19	Thelma Harper (D) Kwame Leo Lillard (I)	89.6% 10.4%
21*†‡	Douglas Henry, Jr. (D) Sharon Bell (R)	56.4% 43.6%
23*†‡	Keith Jordan (R) Gary C. Ledbetter (D)	58.8% 41.2%
25*†‡	Kenneth N. (Pete) Springer (D)	57.3%
27*†‡	Bobby Carter (R) Joe Nip McKnight	51.4% 48.6%
29	John N. Ford (D) Fred Hooks (I)	84.9% 15.1%
31	Curtis Person (R)	100.0%
33	Roscoe Dixon (D)	100.0%

* This is a "contested" race, in which both a Democrat and a Republican ran.

† In this race, had 25% of those who voted and cast votes for the winning candidate switched their vote to the second place candidate, the result of the election would have changed.

‡ In this race, if 25% of those who voted and cast votes for the winning candidate abstained from voting, the result of the election would have changed.

APPENDIX B



Seven-County Region in West Tennessee

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

RURAL WEST TENNESSEE
AFRICAN-AMERICAN AFFAIRS
COUNCIL, INC., et al

Plaintiffs,

v. Case Number 92-2407-TU

NED McWHERTER, et al

Defendants. (Filed Mar. 20, 1995)

JUDGMENT

This action came on for a hearing held on November 1, 1994, the Honorable Gilbert S. Merritt, United States Chief Circuit Judge, the Honorable Bailey Brown, United States Circuit Judge and the Honorable Jerome Turner, United States District Judge, presiding, and the issues having been duly heard and a decision having been rendered,

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the defendants, in accordance with the Opinion of Three-Judge Court docketed February 22, 1995.

APPROVED:

/s/ Jerome Turner
JEROME TURNER
UNITED STATES
DISTRICT JUDGE

ROBERT R. DI TROLIO
CLERK

/s/ Earline Grayer
(By) DEPUTY CLERK

3-21-95
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., MINNIE BOMMER, JEAN CARNEY, C. T. BOYD, BRENDA WOODS, SHIRLEY KEE, ANNA FAYE MOORE, REV. WILLIAM SMART, and WARREN DICKERSON, Plaintiffs, v. NED R. MCWHERTER, Governor of the State of Tennessee, JOHN WILDER, JAMES NAIFEH, WILL BURNS, LENITA MCGRAW, JANET BLACK, JUDY BISHOP, ELLA MAY ESCUE, SPENCE DUPREE, BOBBY WHITE, and LINDA BURNETT, Defendants.	CIV. 92-2407-TUBRO Judge Merritt Judge Turner [House/Senate Reapportionment] (Filed Mar. 22, 1995)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that plaintiffs, Rural West Tennessee African-American Affairs Council, Inc., Minnie Bommer, Jean Carney, C. T. Boyd, Brenda Woods, Shirley Kee, Anna Faye Moore, Rev. William Smart, and Warren

Dickerson, pursuant to 28 U.S.C.A. § 1253, appeal to the Supreme Court of the United States from the February 22, 1995 Opinion and Judgement of the Three-Judge Court.

Dated: March 22, 1995

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., MINNIE BOMMER, JEAN CARNEY, C. T. BOYD, BRENDA WOODS, SHIRLEY KEE, ANNA FAYE MOORE, REV. WILLIAM SMART, and WARREN DICKERSON, Plaintiffs, v. NED R. MCWHERTER, Governor of the State of Tennessee, JOHN WILDER, JAMES NAIFEH, WILL BURNS, LENITA MCGRAW, JANET BLACK, JUDY BISHOP, ELLA MAY ESCUE, SPENCE DUPREE, BOBBY WHITE, and LINDA BURNETT, Defendants.	CIV. 92-2407-TUBRO Judge Merritt Judge Turner [House/Senate Reapportionment] (Filed Apr. 12, 1995)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that plaintiffs, Rural West Tennessee African-American Affairs Council, Inc., Minnie Bommer, Jean Carney, C. T. Boyd, Brenda Woods, Shirley Kee, Anna Faye Moore, Rev. William Smart, and Warren

Dickerson, pursuant to 28 U.S.C.A. § 1253, appeal to the Supreme Court of the United States from the March 20, 1995 Judgement of the Three-Judge Court.

Dated: April 12, 1995

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§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Supreme Court, U.S.
FILED
MAR 21 1995
CLERK

(2)

No. 94-1922

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., *et al.*,
Appellants,

v.

NED MCWHERTER, Governor of Tennessee, *et al.*,
Appellees.

On Appeal from the United States District Court for the Western District of Tennessee

---

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1922

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., *et al.*,
Appellants,

v.

NED MCWHERTER, Governor of Tennessee, *et al.*,
Appellees.

On Appeal from the United States District Court for the Western District of Tennessee

---

MOTION TO DISMISS OR AFFIRM

STATEMENT

Appellants in this case filed suit claiming that Tennessee's 1992 districting plan for its State Senate violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, by failing to provide "additional majority-black seats in the state senate for west Tennessee." J.S. App. 1. The State's plan included—in addition to one majority-black district in Nashville, which was not at issue—two majority-black districts in Shelby County (containing Memphis). Appellants sought the creation of two additional majority-black seats in southwest Tennessee, one to be located in Shelby County and one to be located in selected portions of Shelby County plus four (originally, six) surrounding counties. *See Rural W. Tenn. African-American Affairs Council v. McWherter*, 836 F. Supp. 453 (W.D. Tenn.

1993) (*RWTAAAC I*), *vacated and remanded*, 114 S. Ct. 2775 (1994).[1]

The three-judge district court, in its initial ruling, held that Section 2 entitled appellants to one additional majority-black seat in western Tennessee. *Ibid.* As the district court subsequently described that first holding, the court "focused on statewide proportionality rather than regional proportionality in west Tennessee," discounted the relevance of the evident "influence" districts in the State's plan (*i.e.*, districts where black voters, though not a majority, are a sizable group with substantial influence on elections), and "required substantial statewide proportionality of majority-black districts to black voting-age population." J.S. App. 2, 1. On appeal, this Court vacated the judgment and remanded for reconsideration in light of *Johnson v. DeGrandy*, 114 S. Ct. 2647 (1994). *See* 114 S. Ct. 2775, 2776 (1994).

On remand, the district court reversed itself and held that the State's plan did not violate Section 2. J.S. App. 1-35. Most importantly, the court now concluded that "the voluntary creation of influence districts by a legislature should be counted as a factor weighing against finding a § 2 violation . . . in evaluating the totality of the circumstances." *Id.* at 11; *see id.* at 11-20. The court found that appellants had not demonstrated that their proposed plan—which would substitute a single majority-black district for two of the three strong influence districts created by the State's plan (districts with black voting-age population of at least 30%, J.S. App. 20-24) —"would reduce vote dilution. To the contrary, it appears as though black voters might have more influence on the legislative process with two strong influence districts than they would with one additional majority-

---

[1] Appellants' two successively proposed "rural" districts (the multicounty districts, not wholly within Shelby County) are shown on maps included at pages 35a-36a of the appendix to the jurisdictional statement in No. 93-1108, filed by the state officials after the district court's initial ruling.

minority district." J.S. App. 24 (footnote omitted).[2] In these circumstances, the court ruled, where the State's plan in fact created three majority-black districts in addition to the several influence districts, appellants had not carried their burden of demonstrating (to quote Section 2), "based on the totality of circumstances, . . . that the political processes leading to nomination or election in the State . . . are not equally open to participation by [black citizens] in that [such citizens] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" (42 U.S.C. § 1973(b)). J.S. App. 24-25.[3]

In accord with this fuller analysis of the factors relevant to Section 2, the district court next abandoned its previous rigid focus on proportionality of the number of majority-black districts to relevant black-population figures, concluding "that § 2 of the Voting Rights Act does not require proportionality." J.S. App. 25. The court observed that this Court in *DeGrandy* had explained that the importance of any particular degree of proportionality depends on the full facts of a case. J.S. App. 27 (quoting 114 S. Ct. at 2661 n.17; *id.* at 2664 (O'Connor, J., concurring)). In this case, the district court ruled, "once we include influence districts in the calculus, the lack of proportionality is not significant enough to compel a holding that the 1992 Plan violates the Voting Rights Act." J.S. App. 30-31.

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[2] The district court later made the same point: "creating an additional majority-minority district at the expense of two or more districts with significant black population would not necessarily enhance black influence in the state senate and reduce vote-dilution. Instead, amending the 1992 Plan to add another black district might have the opposite effect." J.S. App. 34.

[3] The court observed that its ruling on influence districts did "not imply that the legislature could adopt a plan under current circumstances with no majority-minority districts at all if it created a sufficient number of influence districts." J.S. App. 24 n.11.

Finally, the court revisited the dispute over whether the proportionality analysis should concentrate on numbers from the State as a whole or on numbers from the region where proof was introduced on the threshold conditions under *Thornburg v. Gingles*, 478 U.S. 30 (1986)—here, seven counties in western Tennessee. J.S. App. 31-34. The court observed that "virtually all of the evidence presented in this case concerned west Tennessee" and that it "should have evaluated more closely regional statistics in [its] earlier decision." *Id.* at 31. Noting at least two different ways of figuring the regional numbers in assessing the degree of proportionality, at least one of which reflected a lack of proportionality, the court ultimately concluded: "[w]hen we include the influence districts in our analysis of the 'totality of the circumstances' we find that both methods of regional analysis yield findings that § 2 has not been violated." *Id.* at 34.

REASONS TO DISMISS OR AFFIRM

The jurisdictional statement presents two issues for review, one involving the relevance of influence districts to Section 2 "totality of circumstances" analysis and the other involving the use of voting-age population and/or total population in measuring proportionality as one element in that analysis. J.S. i. Neither issue presents a ground for plenary review of the judgment of the three-judge district court. Indeed, in their effort to find a path around applicable law, appellants have so refined their contentions that they have stated issues not actually presented by the decision below. *See* notes 5, 10, *infra*. In any event, the district court's rulings are manifestly correct under *Johnson v. DeGrandy*, and there is no division among the lower courts warranting this Court's review.[4]

---

[4] Appellants do not even cite any contrary authority on their "total population" issue. J.S. 26-28. On the "influence district" issue, the district court in this case noted the absence of any other authority. J.S. App. 11. Appellants cite three decisions as supposedly creating a conflict that warrants review (J.S. 16-17), but

The ultimate judgment of the district court finding no Section 2 violation is not clearly erroneous. *See DeGrandy*, 114 S. Ct. at 2662; *Gingles*, 478 U.S. at 79. The judgment should be affirmed or the appeal dismissed.

1. Appellants' predominant contention is that the district court mistakenly relied on the existence of several strong influence districts (which would be partly eliminated by the additional majority-black district appellants propose) in finding, based on the "totality of circumstances" (42 U.S.C. § 1973(b)), that appellants had failed to prove a violation of Section 2. J.S. 10-26. Appellants themselves appear to recognize, however, that the presence of influence districts *is* a proper consideration in Section 2 analysis. J.S. 11 n.2. That proposition is undoubtedly correct under *DeGrandy*, and it is not clear what other *legal* principle appellants can plausibly claim the district court adopted or, for that matter, what principle appellants urge this Court to announce instead.[5] In

---

there is no conflict at all, much less a live one: not one of the three cited decisions holds that influence districts can never be an important factor in defeating a claim of vote dilution, and any such suggestion would not, in any event, warrant review in light of the subsequent decisions of this Court making any such view insupportable, *i.e.*, *Chisom v. Roemer*, 111 S. Ct. 2354 (1991), *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993), and *DeGrandy*—all discussed below.

[5] In trying to distinguish the legal principle they accept from some other principle they challenge, appellants state that the district court treated influence districts as "simply a substitute for effective minority voting districts." J.S. 11 n.2. That claim is plainly wrong. The district court explicitly and repeatedly treated influence districts as a factor—an important fact in this case—in the overall "totality of circumstances" analysis. *E.g.*, J.S. App. 11, 13, 15, 17, 24, 30-31, 34. Moreover, as appellants recognize (J.S. 25-26), the court expressly disclaimed any notion that influence districts were a simple substitute for majority-black districts, indicating that its reliance on influence districts depended on the fact that the Senate plan *also* provided for majority-black districts. J.S. App. 24 n.11. Thus, the proposition that appellants challenge in their jurisdictional statement is not in fact the premise

any event, once it is clear that influence districts are a proper, potentially important factor in the "totality of circumstances" analysis, and that proportionality of electoral results as counted by numbers of majority-minority districts is not the effectively dispositive issue under Section 2, there simply is no basis for deeming clearly erroneous the district court's fact-specific finding that appellants in this case had failed to prove that the State Senate plan denied them "equal political opportunity" (*DeGrandy*, 114 S. Ct. at 2658)—where the plan created several majority-black districts, at a level not far from proportionality in the region at issue (J.S. App. 31-34), and also created several substantial additional influence districts, which provided at least as much political influence for black voters as, and perhaps more than, appellants' proposed plan (*see, e.g.*, J.S. App. 22, 24, 34).

Appellants' entire challenge rests on the contention, reflected throughout its jurisdictional statement, that Section 2 analysis requires an essentially exclusive focus on the number of seats "guaranteed" by majority-minority districts, separate and apart from a broader inquiry into minority opportunities for electoral and political participation, as by influencing elections through forming alliances with other voters. But that rigid view of Section 2 was incompatible with applicable law even before *DeGrandy*: the statutory text itself requires a broad "totality of circumstances" inquiry into whether the State's electoral processes are "equally open to participation by [black citizens] in that [such citizens] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" (42 U.S.C. § 1973(b)); Congress rejected proportionality in favor of a self-consciously flexible and fact-intensive inquiry (*see* J.S. App. 6-7, 15-18); this Court has recog-

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of the district court's decision—a reason for dismissing the appeal as to the first question presented.

nized that the voting strength of concern in Section 2 is enhanced sometimes by *adopting* and sometimes by *rejecting* majority-minority districts in favor of influence districts (*Voinovich v. Quilter*, 113 S. Ct. 1149, 1156 (1993), quoted at J.S. App. 13); and the Court also has expressly ruled that diminished "opportunity to participate in the political process" is a necessary part of any Section 2 claim and, contrary to appellants' pervasive submission (*e.g.*, J.S. App. 11, 13, 19), is *not* to be divorced from the "opportunity to elect" (*Chisom v. Roemer*, 111 S. Ct. 2354, 2365 (1991)).[6] And if there was any remaining uncertainty prior to *DeGrandy* about the incorrectness of appellants' view of the decisive importance of the numbers of majority-minority districts, there can be none after *DeGrandy*, which is starkly inconsistent with appellants' position.

The Court in *DeGrandy* began by reiterating that proof of the three *Gingles* preconditions was not sufficient to establish a Section 2 violation (114 S. Ct. at 2657) and then went on to discuss the "totality of circumstances" analysis that is required. The Court explained that "the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts. Lack of electoral success is evidence of vote dilution, but courts must also examine other evidence in the totality of circumstances, including the extent of the opportunities minority voters enjoy to participate in the political processes." *Ibid.* Noting that the focus of the statutory inquiry was "equal political opportunity" judged

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[6] The Court said in *Chisom*: "the inability to elect representatives of their choice is not sufficient to establish a violation unless, under the totality of the circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process. The statute does not create two separate and distinct rights." 111 S. Ct. at 2365. The Court specifically stated that it was not proper under Section 2 "to separate the opportunity to participate from the opportunity to elect." *Ibid.*; *see also id.* at 2365 n.24. *See* J.S. App. 14.

in light of "the totality of facts," the Court concluded that "the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority preferred candidates of whatever race." *Id.* at 2658 & n.11. Because of the required broad, multi-factor focus on " 'the totality of circumstances' " (*Id.* at 2660, quoting Section 2), the Court held that proportional electoral success as guaranteed by majority-minority districts does not decide Section 2 cases: the absence of such proportionality does not establish a violation, and its presence creates no safe harbor; rather, the probative value of the number of majority-minority districts, whether equal to or short of proportionality, depends on other facts varying from case to case. *Id.* at 2660-61 & n.17. *See also id.* at 2664 (O'Connor, J., concurring) ("Lack of proportionality can never by itself prove dilution, for courts must always carefully and searchingly review the totality of the circumstances, including the extent to which minority groups have access to the political process.").

The reason for this fact-specific focus of Section 2, the Court explained (echoing *Voinovich, supra*), is that Section 2 may be undermined rather than fulfilled by an across-the-board insistence on sufficient numbers of majority-minority districts: the Court condemned the "tendency to promote and perpetuate efforts to devise majority-minority districts even in circumstances where they may not be necessary to achieve equal political and electoral opportunity." *Id.* at 2661. Accordingly, although majority-minority districts are "sometimes" necessary under Section 2, "there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice." *Ibid.*[7] The Court thus made clear (echoing

[7] "Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue

Chisom, supra) that the statutorily protected opportunity "to elect" is not dependent on majority status in a district —a ruling directly contrary to appellants' contention that the right to elect, allegedly separate from any right to participate in the political processes, mandates majority-minority districts in preference to influence districts.

The Court's ruling in *DeGrandy*—with its rejection of any rigid focus on guaranteed majority-minority districts in favor of a fact-specific weighing of *all* relevant facts—shows that appellants' challenge to the district court's analysis in this case is plainly incorrect. Nothing about that challenge, moreover, warrants plenary briefiing and argument. Not only is there no live conflict on the issue (*see* note 4, *supra*), but there is no relevant legal principle for the Court to clarify beyond what *DeGrandy*, with its unmistakable commitment to a "totality" standard, itself made clear. The district court's decision here relied on no "radical new concept" under Section 2 (J.S. 26), but on an approach whose validity under Section 2 was made crystal clear by *DeGrandy*.

All that would be left for this Court upon plenary consideration, therefore, is a review of the particular findings made by the district court based on that court's deep familiarity with the political realities in the State at issue. But those findings are well grounded in the record.[8]

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of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics." *Ibid.*

[8] The State Senate plan (with its 33 seats) includes, in addition to three majority-black districts, three districts with more than 30% black voting-age population (the "influence districts" under the district court's standard) as well as two other districts with more than 20% black voting-age population. J.S. App. 23. Relying on the three influence districts in combination with the three majority-black districts, the district court based its finding of lack of proved vote dilution on its assessment of the electoral opportunities of black voters, citing a statistical analysis of recent elections and the specific testimony from two State Senators demonstrating the electoral influence of black voters outside the majority-black districts. J.S. App. 19-24.

Appellants have advanced no basis on which those findings could reasonably be reversed (under the clearly erroneous standard of review).[9] Accordingly, appellants' first question presented supplies no basis for anything but a summary affirmance of the decision of the district court (or dismissal of the appeal).

2. Appellants' second question presented asks this Court to grant plenary consideration to decide that "total population is *a* proper measure of proportionality in this case." J.S. 26 (emphasis added). *See* J.S. 26-28. Notably, appellants now carefully avoid claiming that voting-age population is an *improper* measure of proportionality; they merely fault the district court for not *also* examining proportionality in light of total-population figures, which are slightly different (*see* J.S. 27). This argument provides no basis whatever for review of the district court's judgment.

First, appellants can point to no passage in the district court's opinions in this case that reject the argument appellants now make. *See* J.S. App. 4 and *RWTAAAC I*,

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[9] Appellants' efforts to undermine the factual finding of no vote dilution begin with a discussion of certain political-science commentary having nothing to do with the particular circumstances of this case. *See* J.S. 20-21. When appellants turn to this case, their main point is to allege that a State Senator testifying as to influence districts misreported a particular vote in the Tennessee Senate as an example. J.S. 22. But this criticism is woefully inadequate to undermine the district court's finding: the criticism focuses on only a single example cited by the Senator in support of his broadly based testimony to the point at issue—that black voters in influence districts *do* influence the elections and legislative behavior of himself and comparably situated Senators. *See* J.S. App. 21-23. Appellants' only other fact-specific contention is criticism of the strength of the evidence of recent elections showing the power of 25% voting blocs. J.S. 23-24. But appellants merely complain that the evidence did not break out black/white voting or specific influence districts, without themselves undertaking to perform the analysis they say should have been performed. Such naked speculation about what other evidence might show does not destroy the value of the evidence introduced, much less undermine the overall finding of the district court.

836 F. Supp. at 462, the two passages cited by appellants (J.S. 26). The reason is not mysterious. Appellants have never before made this argument in their filings in the case.[10] The district court's first opinion, rejecting the quite different argument that total population must be chosen *to the exclusion of* voting-age population, is not an opinion resting on, or precedent for, rejection of appellants' new contention that both measures should be considered if the court is asked to do so. Appellants, in short, are challenging the judgment below on a ground not reflected in the opinion of or argued to the lower court.

Second, and in any event, unless appellants are repeating the same rigid overemphasis on a precisely measured proportionality as infects their argument against influence districts, their argument for review and reversal on this second basis necessarily rests on the assertion that a mild change in one factor in the analysis would wholly transform the district court's judgment that no vote dilution was proved in this case. That assertion is worse than speculative. Given that the degree of departure from proportionality is only one factor in the "totality of circumstances" analysis (J.S. App. 25-31); that the district court found no vote dilution despite noting a departure from voting-age proportionality (J.S. App. 29, 33-34); and that the numerical differences at issue are small (*see* J.S. 27), it is simply implausible to suggest that the district court's "totality of cirmumstances" finding of no vote dilution would turn around 180 degrees if express addi-

[10] Appellants did not argue on remand to the district court that, if voting-age population figures were going to be considered, total-population figures should *also* be considered. Instead, as in their jurisdictional statement on appeal from the district court's original decision, appellants argued on remand that "total *rather than* voting age population of African-Americans is the proper measure of proportionality in this case." Plaintiffs' Brief on Remand at 4 (filed Aug. 26, 1994) (emphasis added). *See also* 93-1379 J.S. i (Question 1: "Whether, under Section 2, total population, rather than voting age population, is the appropriate numerical basis for judging the representative fairness of a redistricting plan"). The appeal as to the second issue should be dismissed on this ground.

tional consideration were given to the slightly greater degree of departure from total-population proportionality. Indeed, the implausibility of that suggestion is confirmed by appellants' failure to argue in its brief to the district court that, even if a proper consideration of voting-age proportionality does not support a finding of vote dilution here, consideration of total-population proportionality as well nevertheless should and would alter that "totality of circumstances" assessment in this case. There is no reason for this Court to grant plenary review of this fact-specific, new, and unlikely claim.

Third, and finally, the district court's focus on voting-age population is neither incorrect nor in need of review. As the district court here observed, this Court has noted "the prevalence of [the voting-age population] standard with approval." *RWTAAAC I*, 836 F. Supp. at 463, citing *Growe v. Emison*, 113 S. Ct. 1075, 1079 (1993), itself citing *Romero v. Pomona*, 883 F.2d 1418, 1425-26 (9th Cir. 1989) (listing cases), and *Gingles*, 478 U.S. at 48, 50. A focus on voting-age population, even an exclusive focus, accords with Section 2's guarantee of *voting* rights. Moreover, any difference there may be in practice between an exclusive and a primary focus on voting-age population is not likely to be important to overall results in light of the diminished importance of proportionality after *DeGrandy*. Certainly, there is no reason to think that the difference is important in this case and hence no reason to grant plenary review on the issue here.[11]

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[11] We note that, if the Court were to grant plenary review, two additional grounds for affirming the judgment would be presented, drawn from the State's initial jurisdictional statement. First, the degree of proportionality when properly measured on a regional basis is greater than the district court recognized. *Compare* J.S. App. 31-34 *with* 93-1108 J.S. 11-12. Second, a Section 2 claim cannot properly be premised on failure to create a proposed majority-minority district, such as those appellants defined, that is drawn on the basis of race in derogation of traditional districting principles. *See* 93-1108 J.S. 13-18; *cf. Miller v. Johnson*, 63 L.W. 4726 (U.S. June 29, 1995) (constitutional standards).

CONCLUSION

The judgment of the district court should be summarily affirmed or the appeal dismissed.

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No. 94-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., *et al.*,

Appellants,

v.

NED R. McWHERTER, Governor of Tennessee, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

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ARGUMENT

In attempting to summarily dismiss the issues presented in RWTAAAC Appellants' Jurisdictional Statement as insubstantial, Appellees cite no authority and offer no analysis to support the district court's decision to give "influence districts" significant weight in a vote dilution determination where there was evidence of extreme racial polarization in voting. Appellees' Motion to dismiss or affirm has failed to address the substance of the Jurisdictional Statement, lacks serious merit and should be denied. The Court should note probable jurisdiction over the issues presented herein.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

As demonstrated in RWTAAAC's Jurisdictional Statement, this appeal presents issues of critical importance to the interpretation and enforcement of the Voting Rights Act. The three-judge district court erred in substituting so-called "influence districts" for majority-minority districts in its vote dilution calculus where it found extreme racial polarization in voting. After apparently giving substantial weight to those districts, the district court reversed its prior finding of vote dilution. By holding that the statute only protects the equal opportunity of minorities to elect "some" candidates of their choice, in combination with theoretical influence over the election of others who are admittedly not their candidates of choice, the district court impermissibly amended Section 2 of the Voting Rights Act and substantially reduced its scope.

I. Section 2 Protects the Equal Opportunity to Elect.

Appellees have failed to address directly the issue of how "influence districts" should factor into a vote dilution calculation, merely implying that they are a "potentially important factor." Motion to Dismiss or Affirm at 6. They cite no

authority and offer no analysis to support this contention. Instead, Appellees attempt to miscast RWTAAAC Appellants' equal opportunity claims to deflect attention from the serious issues in this case.

A. Appellees mischaracterize Appellants' argument by claiming that Appellants seek proportional representation or "guaranteed" seats. *Id.* To the contrary, Appellants seek only that which Section 2 protects—the equal opportunity of minorities to elect candidates of their choice.

Appellees insist that *Johnson* v. *DeGrandy*, 114 S.Ct. 2647 (1994), "is starkly inconsistent with appellants' position." Motion to Dismiss or Affirm at 7. They are wrong. *DeGrandy* held that "the ultimate right of Section 2 is equality of opportunity." 114 S.Ct. at 2658 & n.11. That is precisely Appellants' contention in this case.

Appellees reliance on *Johnson* v. *De Grandy* is misguided. The passage cited by Appellees to support factoring influence districts into a vote dilution calculation ignores the district court's findings extreme racial polarization in voting and is, therefore, taken completely out of context. This Court reaffirmed in *De Grandy* that "society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity." 114 S.Ct. at 2661. Far from endorsing substituting influence districts for minority opportunity districts, *De Grandy* holds only that were racial bloc voting is *not* present and minorities have "no need to be a majority within a single district in order to elect candidates of their choice," there is no duty to create majority-minority districts. 114 S.Ct. at 2661.

The court below found that majority-minority districts are required in Tennessee in order for African-Americans to have the equal opportunity to elect candidates of their choice. *RWTAAAC* v. *McWherter,* 836 F. Supp. 453, 463 (W.D.

Tenn. 1993) [*RWTAAAC I*] (because of extreme racial polarization "African-American candidates cannot expect to succeed in majority-white districts"). Appellees concede, as they must, that majority-minority districts are "'sometimes' necessary under Section 2" where minorities are unable to form coalitions with voters from other racial and ethnic groups and elect candidates of their choice. Motion to Dismiss or Affirm at 8. Such are the conditions, as the district court found, which exist in Tennessee.

B. Appellees misstate the holding of the three-judge court with regard to influence districts. The court did not, as Appellees claim, hold merely that it was "proper" to consider the existence of so-called influence districts in evaluating a Section 2 claim. Motion to Dismiss or Affirm at 5. To the contrary, the court held that the existence of influence districts was dispositive and defeated Appellants' vote dilution claim. According to the lower court:

> Were there no influence districts included in the 1992 Plan, the lack of proportionality in this case combined with other factors would be sufficient to find that Section 2 had been violated. But once we include influence districts in the calculus, the lack of proportionality is not significant enough to compel a holding that the plan violates the Voting Rights Act.

App. at 30-31. The ruling of the district court that the presence of influence districts precluded a remedy for the inability of African-Americans to elect candidates of their choice was legal error under Section 2 and the decisions of this Court.

As Appellees themselves apparently concede, influence districts are not a "substitute for majority African-American districts." Motion to Dismiss or Affirm at 5 n.5. Yet, in giving "influence districts" preclusive effect in this case, and in failing to articulate any standards for their use in lieu of

majority-minority districts, that is precisely the import of the district court's decision.

C. Appellees entirely misstate Appellants' position by claiming that Appellants "appear to recognize . . . that the presence of influence districts is a proper consideration in Section 2 analysis." Motion to Dismiss or Affirm at 5. What Appellants actually said was that where majority-minority districts could not be drawn it would be proper for a court to consider the existence of districts "in which minority voters, with the help of white crossover votes, could elect candidates of their choice." J.S. at 10 n.2.[1] Appellants have never suggested that the district court "properly considered" so-called influence districts, in which African-Americans admittedly do not have the equal opportunity to elect candidates of their choice, in denying appellants' Section 2 claim.[2]

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1. As appellants have previously noted, the standard under Section 2 is one of equal opportunity "to elect representatives" of choice, 42 U.S.C. Section 1973(b), and not merely the opportunity to influence elections. J.S. 10.

2. Appellees contend that the first question presented raises issues "not actually presented by the decision below." Motion to dismiss or Affirm at 4. The argument is makeweight and should be dismissed out of hand. The district court held that even though Appellants established "all three *Gingles* preconditions," App. at 6, and despite the fact that the challenged plan did not provide African-Americans "the opportunity to elect . . . a candidate of their own race," App. at 24, Appellants were not entitled to a remedy because they were (in theory) sufficiently numerous in some districts to "influence elections." App. at 9. The correctness of this holding is directly raised in the first question presented, J.S. at i; Appellees' contention to the contrary is so frivolous as not to warrant further discussion.

II. The District Court's Influence Theory Is Erroneous and Subject to Plenary Review by this Court.

Appellees have made no real attempt to rebut arguments against the three-judge district court's influence theory. They cite no contrary social-science authority, and try to minimize the importance of erroneous testimony from a State Senator that the lower court found highly probative and described at length. App. at 22. Appellees' failure to marshall authority in support of the lower court's theory supports RWTAAAC Appellants' contention that the court's influence theory and findings are completely erroneous.

A. Appellees' attempt to characterize the lower court's ultimate conclusion as "fact-specific" and shielded by the clearly erroneous rule, Motion to Dismiss or Affirm, 6, is unavailing. Rule 52(a), F.R.Civ.P., "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on misunderstanding of the governing rule of law." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984). The decision of the three-judge district court is subject to plenary review by this Court for legal error.

Moreover, the district court expressly affirmed as being "correct" all its prior factual findings in *RWTAAAC I*, 836 F. Supp. at 453, showing minority vote dilution. App. at 5. The legal error of the district court, which is subject to full review by this Court, was in holding that despite these findings the existence of so-called influence districts precluded a remedy under Section 2.

B. Appellees claim that influence districts provide Appellants "as much political influence for [African-American] voters as, and perhaps more than," districts in which African-Americans have the opportunity to elect candidates

of their choice. Motion to Dismiss or Affirm at 6. The claim, aside from being inconsistent with Section 2, has no factual support in the record.

In justifying the preclusive effect of influence districts, the district court found "most probative" the testimony of Senator Cohen concerning the Martin Luther King, Jr. birthday bill. App. at 22. But as Appellants have pointed out—and Appellees have not denied, Motion to Dismiss or Affirm at 10 n.9—Senator Cohen's testimony was factually incorrect. The existence of influence districts had no effect whatever on passage of the King bill. J.S. at 22. Appellees' influence theory, based as it is on erroneous facts, is therefore fatally flawed.

Aside from the anecdotal (and erroneous) testimony of Senator Cohen, the lower court, as Appellees noted, relied on a so-called "statistical analysis" of recent elections to support its influence districts theory. Motion to Dismiss or Affirm at 9. However, as Appellants have pointed out, J.S. at 23, the overwhelming majority of the contests (30 out of 33) did not involve minority influence districts at all, while none of the contests showed the patterns of White/African-American voting or turn out. As a consequence, it is impossible to determine what the influence of African-American voters in fact was in *any* of the elections. In truth, there is no statistical evidence in the record to support Appellees' bald assertion that influence districts provide "as much political influence for African-American voters as, and perhaps more than," districts in which African-Americans have the opportunity to elect candidates of their choice.

There is, of course, as Appellants have pointed out, (J.S. at 20-22) an abundance of social science data that indicates that the districts characterized by the lower court as influence districts are in fact *negative* influence districts. As one commentator has explained, there is a point at which adding African-

Americans to the district creates a "racial backlash" or "racial tipping point" similar to racial tipping points in other areas, such as housing. In the South,

> [a]s the Black population reaches a critical mass, White voters begin to see Black participation as a credible threat; in reaction, White voters band together and develop more conservative preferences. Given this backlash, increasing the number of liberal Black voters in election districts will make Black voters themselves become the majority.

Richard H. Pildes, "The Politics of Race," 108 *Harv. L. Rev.* 1359, 1382 (1995). In propounding its influence district theory the district court completely ignored the empirical evidence of the social sciences and instead indulged in wholly unsupported (and erroneous) assumptions about voter behavior.[3]

III. Total Population Is the Appropriate Measure of Proportionality in this Case.

Contrary to the assertion of Appellees, RWTAAAC Appellants have consistently argued that proportional representative fairness should be measured using a flexible and expansive standard. Motion to Dismiss or Affirm at 10. In voting rights

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3. Appellees chastise appellants for failing "to perform the analysis [of the elections] they say should have been performed." Motion to Dismiss or Affirm at 10 n.9. Appellees fail to note that appellants did perform statistical analysis of the relevant African-American/White contests which formed the basis for the court's conclusion that voting was extremely racially polarized. *RWTAAAC I*, 836 F. Supp. at 463. The 1994 partisan general elections analyzed by the district court took place after trial and were not part of the record.

cases, "electorate" has an expansive meaning that includes both "voters" and "population." 93-1379 J.S. at 14 & 94-1922 J.S. at 28. The three-judge court erred in concluding that it was required by Section 2 to use VAP at the exclusive measure of proportionality. *RWTAAC I*, 836 F. Supp. at 462. This argument provides an appropriate basis for plenary review by this Court.

The facts and circumstances of this case make total population the appropriate measure of proportional representative fairness of the Tennessee State Senate redistricting plan. J.S. at 27-28. An additional majority-minority district in west Tennessee would result in a total of four majority African-American districts in the 33 member state senate, or 12.1% of the total seats. African-Americans would be under-represented as measured by VAP (14.4%), but the lack of proportionality would be even greater as measured by total population (16%).

Using VAP as the exclusive basis for determining proportionality in this case serves no purpose other than to disguise or minimize the lack of representative fairness in the state's plan and is also contrary to the requirement that Section 2 "be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination." *Chisom* v. *Roemer*, 111 S.Ct. 2354, 2368 (1991) (quoting *Allen* v. *State Board of Elections*, 393 U.S. 544, 567 (1969)).

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction in this action and set the case for argument.

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